(9)

No. 89-535-CFX
Status: GRANTED

Title: Louis W. Sullivan, Secretary of Health and Human Services, Petitioner
v.
Elizabeth Stroop, et al.

Docketed:
September 28, 1989

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Brown,Josie Foehrenbach, Aliperti,Jamie B., Czelusta,Thomas J.

Entry	Date	Note	Proceedings and Orders
1	Aug 18 1989	G	Application (A89-156) to extend the time to file a petitio for a writ of certiorari from August 29, 1989 to September 28, 1989, submitted to The Chief Justice.
2	Aug 25 1989		Application (A89-156) granted by the Chief Justice extending the time to file until September 28, 1989.
3	Sep 28 1989	G	Petition for writ of certiorari filed.
4	Nov 1 1989		Brief of respondents Stroop, et al. in opposition filed.
5	Nov 1 1989	G	Motion of respondents for leave to proceed in forma pauperis filed.
6	Dec 6 1989		DISTRIBUTED. January 5, 1990
7	Dec 6 1989	X	Reply brief of petitioner Sullivan filed.
8	Jan 8 1990		Motion of respondents for leave to proceed in forma pauperis GRANTED.
9	Jan 8 1990		Petition GRANTED. and the parties are directed to adhe to the following briefing schedule. The brief of the petitioner must be received by the Clerk on or before February 9, 1990. The brief of the respondents must be received by the Clerk on or before March 6, 1990, and a reply brief, if any, must be received by the Clerk on before March 16, 1990.
			**********
10	Jan 26 1990		SET FOR ARGUMENT MONDAY, MARCH 26, 1990. (3RD CASE)
11	Feb 8 1990		Brief of respondent Larry D. Jackson filed.
13	Feb 9 1990		Joint appendix filed.
14	Feb 9 1990		Brief of petitioner Louis W. Sullivan filed.
12	Feb 12 1990		Lodging received.
15	Mar 2 1990		CIRCULATED.
17	Mar 3 1990	X	Brief of respondent Elizabeth Stroop filed.
16	Mar 5 1990		Record filed.
		*	Certified copy of original record and proceedings, 4 volumes, received.
18	Mar 16 1990	X	Reply brief of petitioner Sullivan filed.
19	Mar 26 1990		ARGUED.

89-535 (1)

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELIZABETH STROOP, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether Social Security child's insurance benefits, paid under 42 U.S.C. 402(d), are "child support payments" within the meaning of an Aid to Families With Dependent Children (AFDC) provision, 42 U.S.C. 602(a)(8)(A)(vi), which requires that the first $50 per month of child support payments be disregarded in determining AFDC eligibility and assistance levels.

PARTIES TO THE PROCEEDINGS

The petitioner is the Secretary of Health and Human Services. The respondents are plaintiffs Elizabeth Stroop, Melissa Lam by her next friend Elizabeth Stroop, Bret Lam by his next friend Elizabeth Stroop, Jamie Stroop by her next friend Elizabeth Stroop, Geneva Powers, Crystal McClanahan by her next friend Geneva Powers, Dorothy Brown, and Robert Lee Turner by his next friend Dorothy Brown, on behalf of themselves and all others similarly situated. The plaintiffs in the district court included Karen B. Carter, Ragene Carter by her next friend Karen B. Carter, Paul Jones, Cory P. Jones by his next friend Paula Jones, and David L. Jones, but they were neither appellants nor appellees in the court of appeals. The Commissioner of the Virginia Department of Social Services was a defendant in the district court and a separate appellee in the court of appeals; this petition does not raise the issue on which the Commissioner was an appellee, and, unlike the Secretary of Health and Human Services, the Commissioner was not an appellant in the court of appeals regarding the issue addressed in this petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELIZABETH STROOP, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 870 F.2d 969. The opinions of the district court (App., *infra*, 14a-22a, 23a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1989. A petition for rehearing with suggestion for rehearing en banc was denied on May 31, 1989 (App., *infra*, 31a-34a). On August 25, 1989, Chief Justice

Rehnquist extended the time for filing a petition for writ of certiorari to September 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 402(a)(7)(A) and (8)(A)(vi), 457(b)(1), and 202(d)(1) of the Social Security Act (42 U.S.C. 602(a)(7)(A) and (8)(A)(vi) (Supp. V 1987); 42 U.S.C. 657(b)(1) (Supp. V 1987); 42 U.S.C. 402(d)(1) (1982 & Supp. V 1987)) are set forth in the appendix (at 35a-39a). Aid to Families with Dependent Children (AFDC) regulations 45 C.F.R. 302.51(b)(1) and 45 C.F.R. 232.20(a) and (d) are set forth in the appendix (at 40a-41a).

STATEMENT

This case concerns the scope of the $50 per month disregard for "child support payments" that Congress has required the States to apply in determining eligibility and assistance levels under the AFDC program.

1. The Aid to Families with Dependent Children (AFDC) program, set forth in Title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), is a cooperative effort by the federal and state governments to provide financial and other assistance on behalf of certain dependent children. For purposes of the AFDC program, a "dependent child" is a needy child who has been deprived of parental care or support by a parent's death, incapacity, or continued absence from the home. 42 U.S.C. 606(a). State participation in the AFDC program is not mandatory, but participating States must follow all applicable federal requirements. Among those requirements are statutory provisions directing the States to consider all income and resources available to the recipient family before determining the need-based amount of AFDC assistance (42

U.S.C. 602(a)(7) (Supp. V 1987)), and provisions specifying various categories of income and resources that are to be "disregarded" in making the determination of an applicant's eligibility (42 U.S.C. 602(a)(8)(A) (Supp. V 1987)). In addition, an AFDC recipient must assign to the State rights of support (42 U.S.C. 602(a)(26)(A) (Supp. V 1987)), including child support payments, and federal law specifies standards and procedures for state recovery of child support payments from noncustodial parents. 42 U.S.C. 651-665.

Child's insurance benefits are provided as part of the Old Age, Survivors and Disability Insurance (OASDI) program, set forth in Title II of the Social Security Act (42 U.S.C. 401 *et seq.*). Child's insurance benefits are available to children if a child's parent was an insured wage earner under the Social Security Act and the insured wage earner has died, become disabled, or retired. 42 U.S.C. 402(d) (1982 & Supp. V 1987). Consequently, child's insurance benefits under Title II are often payable to children who are also members of an AFDC household, including households headed by someone other than the insured parent.

2. In 1984, Congress enacted the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 494, a massive statute filling over 700 pages of the statutes at large and including two major divisions, the Tax Reform Act of 1984 and the Spending Reduction Act of 1984. See *Bowen* v. *Gilliard*, 483 U.S. 587, 589 n.2 (1987). As one of its spending reduction provisions, DEFRA amended Title IV of the Social Security Act to require that, in making AFDC eligibility determinations, the income of any sibling or parent living in the same household would be included as part of the AFDC applicant family's income. § 2640(a), 98 Stat. 1145; 42 U.S.C. 602(a)(38) (Supp. V 1987)). In

Bowen v. *Gilliard, supra,* this Court upheld the constitutionality of the family income requirement.

DEFRA also included a provision specifying that $50 per month of "any child support payments" should be disregarded in determining AFDC eligibility and assistance levels;[1] a parallel provision specified that the first $50 per month of support payments received by the

[1]The disregard provision (DEFRA § 2640(c), 98 Stat. 1146) amended the AFDC statute to provide:

> [I]n making the determination under paragraph (7), the State agency—
>
> • • • • •
>
> (vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title).

42 U.S.C. 602(a)(8)(A)(vi) (Supp. V 1987).

In 1988, Congress further amended this disregard provision (Family Support Act of 1988 (FSA), Pub. L. No. 100-485, Tit. I, § 102(a), 102 Stat. 2346). The current child support disregard provides:

> [I]n making the determination under paragraph (7), the State agency • • •
>
> (vi) shall disregard the first $50 of any child support payments *for such month received in that month and the first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due,* with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title).

To be codified at 42 U.S.C. 602(a)(8)(A)(vi) (emphasis added to show change from prior statute).

State from noncustodial parents should be passed on directly to the AFDC recipients.[2]

3. The Secretary of Health and Human Services (HHS) promulgated regulations to implement various DEFRA changes in the AFDC program. 49 Fed. Reg. 35,586-35,606 (1984). To implement the family income requirement, the Secretary issued a regulation requiring that an AFDC application for a dependent child include the income of any sibling or parent living in the same household. 49 Fed. Reg. 35,599 (1984); 45 C.F.R. 206.10(a)(1)(vii). To implement the $50 per month disregard for child support payments, the Secretary issued regulations requiring a $50 per month disregard for child support payments received from absent parents. 49 Fed. Reg. 35,599, 35,605-35,606 (1984); 45 C.F.R. 232.20(a)

[2] The pass-through provision provided:

> [T]he first $50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month.

DEFRA § 2640(b), 98 Stat. 1145; 42 U.S.C. 657(b)(1) (Supp. V 1987).

In 1988, Congress amended this provision (FSA § 102(b), 102 Stat. 2346) to conform with the 1988 amendment to the disregard provision. See note 1, *supra.* The current pass-through provides:

> *[O]f such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due* shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month.

To be codified at 42 U.S.C. 657(b)(1) (emphasis supplied to show change from prior statute).

and (d); 45 C.F.R. 302.51(b)(1).[3] However, the Secretary did not issue regulations requiring a $50 per month disregard for any other type of payments, including child's insurance benefits.

4. On June 23, 1986, respondents filed a class action against the Secretary of HHS and the Commissioner of the Virginia Department of Social Services.[4] The named plaintiffs consisted of five families in which at least one child received AFDC benefits and at least one sibling received either child support payments from a noncustodial parent or child's insurance benefits—income which had been excluded from the AFDC eligibility determination before DEFRA's adoption of the family income requirement. Respondents challenged the family unit rule itself as unconstitutional and contrary to various Social Security Act provisions. Compl., C.A. App. 2. However, after the decision in *Bowen* v. *Gilliard*, 483 U.S. 587 (1987), upholding the constitutionality of the family income requirement, respondents voluntarily dismissed their challenge to the family income requirement. App., *infra*, 14a. Respondents then refocused their action as a challenge to the inclusion of child's insurance benefits as "income" for purposes of the family income requirement, and, alternatively, to the exclusion of child's insurance benefits from the $50 per month disregard for "child support payments."

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[3] The disregard and pass-through procedures were recently revised. 54 Fed. Reg. 32,308-32,309 (Aug. 4, 1989); 54 Fed. Reg. 37,870 (Sept. 13, 1989). The Secretary has also determined that an absent parent's spousal support payments are included in the $50 disregard. 53 Fed. Reg. 21,642 (1988).

[4] Although the Commissioner of the Virginia Department of Social Services is technically a respondent, Sup. Ct. R. 19.6, references in this petition to "respondents" refer to plaintiffs.

On December 21, 1987, the district court (App., *infra*, 14a) upheld the Secretary's inclusion of child's insurance benefits as "income" under the family income requirement. The court rejected respondents' contention that inclusion of the child's insurance benefits as income would violate the anti-alienation (42 U.S.C. 407(a) (Supp. V 1987)) and representative payee (42 U.S.C. 408(e)) provisions of Title II of the Social Security Act (42 U.S.C. 401 *et seq.*) and found "no evidence" to suggest that the Secretary's interpretation requiring such inclusion was incorrect. App., *infra*, 18a. The district court went on to hold, however, that, contrary to the Secretary's interpretation, the $50 per month disregard for "child support payments" must apply to child's insurance benefits. The court concluded that "[i]t is contradictory to treat Social Security benefits like child support for the purpose of including them in family income and then in another part of the same statute treat them differently from child support payments for the purpose of excluding a family from a potential $50 rebate." *Id.* at 19a-20a. Recognizing that the Secretary's interpretation was due "considerable deference," the court nevertheless found the Secretary's interpretation to be " 'demonstrably irrational.' " *Id.* at 18a (quoting *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980)). On March 4, 1988, the court issued an opinion denying the Secretary's motion to alter or amend the court's decision concerning the scope of the $50 per month disregard for the child support payments. App., *infra*, 23a.

5. The court of appeals (App., *infra*, 1a) affirmed the district court's judgment in its entirety. The court first affirmed the approval of the Secretary's decision to include child's insurance benefits as income under the family income requirement (*id.* at 5a-8a); it noted that, in so ruling, it joined the Eighth, Ninth, and Eleventh Circuits in rejecting plaintiffs' objections to the inclusion. *Id.* at 5a.

The court also affirmed, however, the district court's rejection of the Secretary's determination that the $50 per month disregard for "child support payments" does not include child's insurance benefits. *Id.* at 8a-13a. The court stated that it "perceive[d] no distinction between support derived directly from a father's wages and support provided indirectly through Title II payments." *Id.* at 11a. The court rejected the Secretary's contention that limiting the disregard to payments from absent parents was consistent with a primary purpose of the disregard, as reflected in the purpose of a child support payment disregard adopted in 1974, of encouraging child support payments from absent parents. The court stated that the intent of one Congress could not be inferred from another Congress, and that the AFDC context had changed so much since 1974 that the objective of encouraging payments from absent parents was no longer applicable. The court also stated that this Court in *Bowen* v. *Gilliard*, *supra*, had emphasized a different purpose for the disregard—mitigating the hardship of the family income requirement—and found that this purpose was equally applicable to child's insurance benefits. App., *infra*, 9a-10a.

The court of appeals recognized that its decision on the disregard conflicted with the Eighth Circuit's decision in *Todd* v. *Norman*, 840 F.2d 608 (1988), which had upheld the Secretary's interpretation. See App., *infra*, 11a. Although recognizing that the Eighth Circuit had emphasized the congressional distinction between social security benefits and child support payments, the court found this distinction "too tenuous to support the Secretary's interpretation." *Ibid.* Noting that several States, including Virginia, allow child's insurance benefits to satisfy child support obligations, the court emphasized that child's insurance benefits and parental child support are similar because both are derived from the parent's

earnings. *Id.* at 11a-12a. Finally, the court indicated that the Secretary's "unreasoned distinction raises equal protection concerns" and suggested that rejection of the Secretary's interpretation avoided doubts about its constitutionality. *Id.* at 12a.[5]

REASONS FOR GRANTING THE PETITION

The court of appeals has interpreted a recent congressional enactment in a manner that conflicts with the general statutory usage of the term "child support payments," and totally disregards Congress's subsequent clarification that "child support payments" refer to payments "made by the absent parent." It also rests, at least in part, on wholly unfounded concerns about the constitutionality of excluding child's insurance benefits from the $50 per month disregard. Moreover, its decision directly conflicts with a decision of the United States Court of Appeals for the Eighth Circuit. The issue is of recurring importance to the uniform administration of the AFDC program, and, if the court of appeals' decision is applied nationally, will result in a significant increase in federal and state expenditures. Further review by this Court is therefore plainly warranted.

1. The Social Security Act reflects a pervasive distinction between "child support payments"—which refer to parental payments—and other types of income and resources, including child's insurance benefits. In light of the principle that "a legislative body generally uses a particular word with a consistent meaning in a given context" (*Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972)),

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[5] Although the government submitted a post-argument memorandum concerning the FSA 1988 amendment (see note 1, *supra*), contending that it supported the Secretary's position, the court of appeals failed to discuss, or even acknowledge, the 1988 change.

this consistent use of the term "child support payments" to refer to parental payments cannot be squared with the court of appeals' statutory interpretation.

The term "child support payments" figures prominently in Title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), and invariably refers to payments from absent parents. This statutory usage was clear at the time Congress enacted DEFRA. The 1982 version of Title IV (42 U.S.C. 601 *et seq.*) contains more than twenty references to "child support" or "child and spousal support;" in every instance, the reference is to payments from absent parents, and not to child's insurance or other Social Security benefits.[6] Title IV itself is subdivided into several parts. Part D (42 U.S.C. 651-665) addresses "Child Support and Establishment of Paternity" and includes, inter alia, provisions for the "Office of Child Support Enforcement" in HHS (42 U.S.C. 652); establishment of a Parent Locator Service (42 U.S.C. 653); requirements for a state plan for

[6] See 42 U.S.C. 602(a)(27) ("child support"); 42 U.S.C. 602(a)(28) ("child support"); 42 U.S.C. 602(a)(31)(D) ("child support"); 42 U.S.C. 603(b)(2)(C) ("child support collections"); 42 U.S.C. 603a ("child support"); 42 U.S.C. 652(a)(1) ("child support"); 42 U.S.C. 652(a)(7) ("child and spousal support"); 42 U.S.C. 652(a)(10)(B) ("Office of Child Support Enforcement"); 42 U.S.C. 652(a)(10)(C) ("child support"); 42 U.S.C. 652(b) ("child support"); 42 U.S.C. 653(c)(1) ("child and spousal support"); 42 U.S.C. 654 ("child and spousal support"); 42 U.S.C. 654(6) ("child support"); 42 U.S.C. 654(19)(A) ("child support"); 42 U.S.C. 654(19)(B) ("child support"); 42 U.S.C. 656(b) ("child support"); 42 U.S.C. 657(a) ("child support"); 42 U.S.C. 659(a) ("child support"); 42 U.S.C. 659(b) ("child support"); 42 U.S.C. 659(d) ("child support"); 42 U.S.C. 661(b)(3) ("child support"); 42 U.S.C. 662(b) ("child support"). The 1982 version of Title IV also contains several references to "support payments" and "support obligations" that clearly refer only to payments from absent parents. See 42 U.S.C. 602(a)(26)(B) ("support payments"); 42 U.S.C. 651 ("support obligations"); 42 U.S.C. 653(a) ("support obligations"); 42 U.S.C. 654(5) ("support payments").

"child and spousal support" (42 U.S.C. 654); provisions for enforcement of an individual's legal obligation to provide "child support" or make alimony payments (42 U.S.C. 659); and a grant of authority for civil actions to enforce "child support" obligations (42 U.S.C. 660). Throughout this Title, the term "child support" has a specific meaning—the obligation of parents to support their children.[7]

In contrast to this repeated use of "child support" to refer to parental payments in Title IV, the Social Security Act does not use "child support payments" to refer to child's insurance benefits, or to any other kind of social security benefits. Indeed, under Title II, a child must, in certain circumstances, establish the level of a parent's previous "support" in order to qualify for the government-provided "child's insurance benefit." See, *e.g.*, 42 U.S.C. 402(d)(4) and (8). The fact that child's insurance benefits are intended to *replace* parental support after a parent has died, become disabled, or retired, *Califano* v. *Jobst*, 434 U.S. 47, 52 (1977); *Mathews* v. *Lucas*, 427 U.S. 495, 507 (1976), does not mean that the child's insurance benefits themselves are encompassed in the ordinary usage of the term child support payments, and certainly nothing in Title II indicates that the terms are interchangeable.

The language of the family income requirement itself also reflects this distinction between child support payments and Social Security benefits. The family income requirement and the child support payment disregard are both part of Section 2640 of DEFRA—Sections 2640(a) and 2640(c), respectively. While the disregard refers to

[7] This usage is consistent with the dictionary definition. See *Black's Law Dictionary* 217 (5th ed. 1979) ("child support" defined as the "legal obligation of parents to contribute to the economic maintenance, including education of their children; enforceable in both civil and criminal contexts").

"child support payments" (§ 2640(c), 98 Stat. 1146), the family income requirement states that the requirement applies "in the case of benefits provided under title II" (§ 2640(a), 98 Stat. 1145). In referring to payments under the Title II OASDI program, then, the statute explicitly refers, not to "child support payments," but to "benefits."

Additionally, the problem of obtaining "child support" from absent parents has frequently been the subject of intense congressional attention, and the term "child support" in this context has always referred to the problem of parental payments. See, e.g., FSA, Tit. I, 102 Stat. 2343-2356 ("Child Support and Establishment of Paternity"); Pub. L. No. 98-378, 98 Stat. 1305 ("Child Support Enforcement Amendments of 1984"). Significantly, the latter of these statutes became law less than one month after the enactment of DEFRA, and its use of the term "child support" to refer to parental payments is clear. See, *e.g.*, Section 23(a)(2), 98 Stat. 1329 ("The Congress finds that * * * there is a critical lack of child support enforcement, which Congress has undertaken to address through the child support enforcement program."). Thus, the general statutory usage of the term is directly contrary to the court of appeals' interpretation.

2. The court of appeals' interpretation is also contrary to the purpose of the $50 disregard, as suggested by the available legislative history. Although the phrase "child support payments" is not specifically addressed in the committee reports accompanying the enactment of DEFRA, a similar provision had been adopted by Congress in 1974.[8] The legislative history of that provision explicitly stated that the purpose of the disregard was to provide an incentive for obtaining child support payments

[8] That provision, enacted for a fifteen-month trial period, specified that 40% of the first $50 of monthly "child support" payments collected by the State pursuant to the assignment of support rights would be passed through and disregarded in AFDC eligibility determinations. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2356.

from noncustodial parents. S. Rep. No. 1356, 93d Cong., 2d Sess. 52 (1974). This purpose has no application to child's insurance benefits, which are paid automatically by the federal government.

The Fourth Circuit rejected the relevance of this prior history, stating that "the intent of one Congress cannot be inferred from the activities of another Congress." App., *infra*, 9a. However, when Congress enacts a massive omnibus statute like DEFRA, and adopts specific provisions which are patterned after earlier enactments, it is reasonable to assume, absent some indication to the contrary, that the new provision is designed to further the same purpose as its forerunner. This is especially true where the proposition involves a highly specialized subject matter—such as the meaning of an AFDC disregard for "child support payments."

The distinctions offered by the court of appeals between the situation confronting Congress in 1974 and the situation confronting Congress in 1984 are also unpersuasive. The court's basic contention—that legislative actions to require family cooperation and improve state incentives for locating delinquent parents had "substantially eviscerated" the justification for the disregard as a parental payment incentive (App., *infra*, 10a)—is belied by the repeated congressional findings that nonpayment of child support by noncustodial parents remains a grave national problem. See, *e.g.*, Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 23(a), 98 Stat. 1329; H.R. Rep. No. 159, 100th Cong., 1st Sess. 40 (1987).

Finally, the court of appeals failed to address a recent congressional amendment that clarifies the meaning of the disregard in a manner that substantially supports the Secretary's interpretation of the term "child support payments." Although subsequent congressional statements pose special problems of analysis and interpretation, see *United States* v. *Price*, 361 U.S. 304 (1960), subsequent congressional *enactments* carry "considerable retrospective weight." *Heckler* v. *Turner*, 470 U.S. 184, 211 (1985). See also *South Carolina* v. *Regan*, 465 U.S. 367, 378-379 n.17 (1984). In October 1988, Congress amended the disregard and pass-through provisions. FSA § 102, 102 Stat. 2346. The amendment clarifies that the disregard applies to child support payments from *absent* parents if the payment was made in the month when due. H.R. Conf. Rep. No. 998, 100th Cong., 2d Sess. 98 (1988).[9] By indicating that disregard and pass-through provisions apply to payments from an "absent parent" (see notes 1, 2, *supra*), the amendments lend considerable support to the Secretary's contention that Congress did not contemplate that the disregard would apply to other payments. Despite the submission of a post-argument

[9] Both the House and Senate Committee reports stated that the change was intended as a clarification. H. R. Rep. No. 159 100th Cong., 1st Sess. 73 (1987); S. Rep. No. 377, 100th Cong., 2d Sess. 17 (1988). The Senate Committee report noted that the Committee viewed the amendment as reflecting "the original intent" (*id.* at 17), that "differences of interpretation may exist" (*ibid.*), and that "[t]he Committee does not intend that an inference should be drawn from the enactment of this provision or its effective date as to the meaning of the law as previously in effect" (*ibid.*). The Senate report's reference is apparently to a dispute over the applicability of the disregard to late parental child support payments. See, *e.g.*, *Wilcox* v. *Ives*, 864 F.2d 915 (1st Cir. 1988) (invalidating 45 C.F.R. 302.51(b)(1) because it prohibits pass-through for multiple payments).

memorandum by the government addressing the amendment, the court of appeals did not address, or even acknowledge, this change.

3. The court of appeals failed to give appropriate deference to the Secretary's administrative interpretation. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).[10] Despite its acknowledgement that "Congress has offered no answer to this question" (App., *infra*, 8a-9a), the court of appeals failed to defer to the interpretation provided by the agency charged by Congress with the administration of the AFDC program. Cf. *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970) ("[w]e give HEW the deference due the agency charged with the administration of the [Social Security] Act" in AFDC case); *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970) (HEW's construction of AFDC provision "is entitled to weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program it administers").[11]

In response to DEFRA, the Secretary promulgated regulations to implement the changes to the AFDC program. 49 Fed. Reg. 35,586-35,606 (1984). The Secretary established a procedure for state agencies to follow in forwarding the first $50 of parental support payments to a family (45 C.F.R. 302.51(b)(1)), and required that $50 per

[10] See also *Young* v. *Community Nutrition Institute*, 476 U.S. 974, 980-981 (1986); *Chemical Manufacturers Ass'n* v. *NRDC*, 470 U.S. 116, 125 (1985).

[11] In 1979, HHS replaced the Department of Health, Education and Welfare (HEW) as the federal agency administering the AFDC program. Department of Education Organization Act, Pub. L. No. 96-88, Tit. V, § 509(b), 93 Stat. 695; 20 U.S.C. 3508(b).

month of the child support collections be excluded from AFDC eligibility and assistance determinations (45 C.F.R. 232.20(a) and (d)). The Secretary did not, however, promulgate any regulations to apply the $50 disregard to any form of payments other than parental support payments, such as child's insurance benefits. See 49 Fed. Reg. 35,589-35,590, 35,604-35,605 (1984).[12] The Secretary thus interpreted DEFRA and determined that the child support disregard applied to parental child support payments; that interpretation was entitled to the deference accorded the agency charged with interpreting and administering a complex statute.[13]

4. The court of appeals also relied on concerns about the constitutionality of the disregard. App., *infra*, 12a. However, a congressional determination to disregard the first $50 of child support payments from noncustodial parents, but not child's insurance benefits, easily passes constitutional muster. The evident purpose of providing that the first $50 of child support payments will not be counted in determining eligibility for AFDC benefits was to help secure the cooperation of beneficiaries in the collection of support payments from noncustodial parents and to provide a payment incentive for the noncustodial parents. No such incentives are needed with respect to child's insurance benefits, whose payment is guaranteed by the federal government. In view of the fact that this kind of "statutory discrimination will not be set aside if any

[12] An absent parent's spousal support payments are included in the disregard. See note 3, *supra*; 53 Fed. Reg. 21,642 (1988).

[13] Although the dissent in the Eighth Circuit case stated that the Secretary's interpretation was not entitled to deference because it was "neither consistent nor longstanding," *Todd* v. *Norman*, 840 F.2d at 614 (Lay, C.J., dissenting), the majority concluded that the Secretary "has consistently maintained that only child support payments assigned to the state trigger the disregard." *Id.* at 612.

state of facts reasonably may be conceived to justify it" (*Bowen* v. *Gilliard*, 483 U.S. at 601 (internal quotations omitted)), this difference is surely sufficient to sustain limiting the disregard to parental support payments. The problem of nonpayment of child support remains a congressional priority.[14] Despite the court of appeals' pessimism about the efficacy of a $50 incentive in light of subsequent developments, it was clearly permissible for Congress to decide that a further incentive to collection and payment of parental support payments was needed. See generally *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

The court of appeals also observed that this Court, in *Bowen* v. *Gilliard*, found that the purpose of the disregard was to mitigate the hardship of the family income requirement, and that such a purpose is equally applicable to child's insurance benefits. App., *infra*, 10a. But nothing in *Bowen* v. *Gilliard* suggests that mitigating hardship is the sole purpose of the disregard, and nothing in that opinion is inconsistent with a view that one aspect of the disregard was an effort to encourage child support payments from noncustodial parents. The payments involved in *Gilliard* were child support payments from noncustodial parents, and thus this Court had no occasion to consider possible differences between those payments and child's insurance benefits. The passage quoted by the court of appeals described the operation of the disregard in the context

[14] See, *e.g.*, Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 23(a), 98 Stat. 1329; 134 Cong. Rec. S7651 (daily ed. June 13, 1988) (statement of Sen. Bentsen) ("If we want to reform the welfare system, let us start with an all-out effort to collect child support. The Congress enacted strong legislation in 1975 and in 1984, but despite that legislation only a small fraction of children who live with single parents receive the full credit as awarded to them by the courts. Many receive nothing at all.").

before the Court; it clearly was not a holding about the sole purpose of the disregard, or its scope.

5. Resolution of the issue presented by this case is essential to the uniform administration of the AFDC program. As the court of appeals recognized, its decision squarely conflicts with the Eighth Circuit's decision in *Todd* v. *Norman*, 840 F.2d 608 (1988). In *Todd*, the Eighth Circuit explicitly rejected the claim that "Congress intended the words 'child support payment' to apply to Child's Insurance Benefits." *Ibid*. The Eighth Circuit and the Fourth Circuit disagree on the purpose of the disregard (840 F.2d at 612; App., *infra*, 10a), on the weight to be given the prior disregard (840 F.2d at 611-612; App., *infra*, 9a-10a), on the deference to be given the Secretary's interpretation (840 F.2d at 612; App., *infra*, 10a-12a); and on the rationality of limiting the disregard to parental support payments (840 F.2d at 612; App., *infra*, 12a).[15] State courts have issued similarly conflicting opinions.[16]

The issue also has significant fiscal implications. HHS estimates that the court of appeals' decision, if applied nationwide, would require increased annual expenditures of close to $44 million in federal and state outlays.[17] The

[15] See also *Jackson* v. *Mullany*, 708 F. Supp. 483 (N.D.N.Y. 1989) (disregard includes child's insurance benefits); *Davis* v. *Sallee*, No. Civ. 4-86-27 (E.D. Tenn. Oct. 10, 1986) (same); *McBee* v. *Sallee*, No. Civ. 2-86-103 (E.D. Tenn. Nov. 26, 1986) (same).

[16] Compare *Baylor* v. *New Jersey Dep't of Human Services*, 235 N.J. Super. 22, 561 A.2d 618 (1989) (disallowing disregard for child's insurance benefits) with *Ledbetter* v. *Foster*, 180 Ga. App. 696, 350 S.E. 2d 31 (1986) (permitting disregard for child's insurance benefits). See also *In re D'Antignac*, No. 16444-86 (N.Y. Sup. Ct. Oct. 3, 1986) (permitting disregard for child's insurance benefits).

[17] In 1986, almost 460,000 AFDC families received unearned income (U.S. Dep't of Health and Human Services, Family Support Administration, *Characteristics and Financial Circumstances of AFDC Recipients 1986*, at 77; 15.9% of these AFDC families—or approximately 73,000—received social security benefits (*ibid.*). Although HHS does not separate child's insurance benefits from other social security benefits, the Department believes that almost all of the families in this category received child's insurance benefits. A disregard of $50 per month amounts to $600 per year for each recipient family. The cost of the disregard for 73,000 families at $600 per year is $43.8 million annually.

Fourth Circuit's decision ~~opinion~~ may also have an impact in other areas. At least two cases are now pending in which the claim has been made that veterans' benefits are similarly entitled to the $50 disregard.[18]

In view of the conflicting interpretations by the courts of appeals and of the recurring importance of this issue, further review is clearly warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[18] *Trusty* v. *Cullen*, No. 88-C-0322 (E.D. Wisc.); *Green* v. *Sullivan*, No. Civ. 89-0529A (W.D.N.Y.).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2530

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRETT LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT

and

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, DEFENDANT

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

No. 88-2538

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRETT LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES; OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES

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Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, District Judge (CA-86-398)

[Filed Mar. 28, 1989]

Before: MURNAGHAN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

In this class action, custodial parents receiving aid to families with dependent children (AFDC) appeal from the district court's grant of summary judgment to defendants, the Secretary of the Department of Health and Human Services and the Commissioner of the Virginia Department of Social Services (collectively, the Secretary). The district court upheld the Secretary's interpretation of federal statutes and regulations requiring applicants for AFDC to include, for the purpose of determining family income, brothers and sisters living in the same household who receive Title II social security payments.

The Secretary cross-appeals the district court's grant of summary judgment to the parents, requiring the Secretary to disregard as income the first $50 of the Title II social security benefits.

We affirm on both issues.

I

Plaintiffs are custodial parents who sue in behalf of their children who do not share the same father. In each case, some of the children in the household receive social security payments under Title II of the Social Security Act because of the insured status of their disabled or deceased fathers. Other children in the household receive AFDC only. The custodial parent in each case is the representative payee of the Title II payments, and the applicable statute provides that the representative payee must use the payments for the "use and benefit" of the beneficiary. Failure to do so will result in criminal prosecution. 42 U.S.C. § 407(e). The statute also contains an "anti-alienation" provision, 42 U.S.C. § 407(a), barring transfer of the right to receive future payments and exempting all payments from attachment, garnishment, and other legal process.

Before 1984, a family applying for AFDC was not required to include all resident family members but could exclude in its application family members who received support from other sources. As part of the Deficit Reduction Act of 1984 (DEFRA), Congress amended the AFDC program to require that a family's eligibility for benefits must take into account the income of parents, brothers, and sisters living in the same home.[1]

The Secretary promulgated regulations which have been interpreted to require inclusion of Title II social security payments in the family income for AFDC purposes.[2] In this case, interpreting the amendment to include Title II

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[1] The amendment in question requires a state plan to:

> provide that in making the determination under paragraph (7) [which sets forth the calculation for eligibility] with respect to a dependent child and applying paragraph (8) [which delineates types of income that are to be disregarded], the State agency shall (except as otherwise provided in this part) include:
>
> (A) any parent of such child and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clause (1) and (2) of section 606(a) [which defines dependent child], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding Section 204(j) [allowing for payments to representative payees] in the case of benefits provided under Title II);

42 U.S.C. § 602(a)(38).

[2] The regulations provide in pertinent part:

> (A) State plan requirements . . .
>
> (1) . . .
>
> (vii) For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:
>
> (A) . . .
>
> (B) Any blood-related or adoptive brother or sister.

45 C.F.R. § 206.10(a)(1)(vii)(1987).

social security payments will result in substantial diminution of AFDC benefits to each named plaintiff and, in one instance, the elimination of AFDC eligibility altogether.

II

The parents assert that inclusion of social security payments in the AFDC calculation violates the "anti-alienation" and representative payee provisions of Title II of the Social Security Act.

We join the Eighth, Ninth, and Eleventh Circuits in rejecting the parents' argument. *See* Gorrie v. Bowen, 809 F.2d 508, 517 (8th Cir. 1987), *cited with approval in* Bowen v. Gilliard, 107 S. Ct. 3008, 3013 n.5 (1987); Creaton v. Bowen, 826 F.2d 6 (9th Cir. 1987); Oliver v. Ledbetter, 821 F.2d 1507 (11th Cir. 1987) (addressing representative payee provision only). We adopt the court's reasoning in *Gorrie*:

> The anti-alienation provision imposes a broad bar against the use of any legal process to reach Social Security benefits. The Secretary's regulation does not subject Title II benefits to legal process, however, nor does it result in an assignment or transfer of benefits. It requires only that Title II benefit recipients apply for AFDC and have their incomes included in the family filing unit. This does not constitute a use of legal process to garnish or attach benefits.

Gorrie, 809 F.2d at 517.

Similarly, the parents' contention that inclusion of social security payments violates the representative payee provision is without merit. The parents suggest that including social security payments in family income forces the representative payees to violate their statutory duties by using Title II payments for family members other than the beneficiary. The Supreme Court rejected this argument in the context of child support payments from noncustodial parents and the Court's reasoning is instructive here:

> [T]he simple inclusion of support income in the benefit calculation [has no] legal effect on the child's right to have it used for his or her benefit. To the extent that a child has the right to have the support payments used in his "best interest," he or she fully retains that right. . . .
>
> [I]t is instructive to ask what would happen to the support payments if there were no AFDC program at all. In that case, it would appear that custodial parents would have to use a much greater portion of the support payments to sustain the family unit, since it could hardly be deemed in the child's best interest for his custodial parent and siblings to have no funds whatsoever.

Bowen v. Gilliard, 107 S. Ct. 3008, 3019-20 & n.20 (1987).

The representative payee provision requires that the funds be used for the "use and benefit" of the beneficiary. Consistent with *Gilliard,* we hold that requirement does not preclude use of the funds for common household expenses typically shared by all household members, for the child is nonetheless benefited by such use. *See Gilliard,* 107 S. Ct. at 3016 n.14. Nor can it be said that spending all of the funds on the child recipient would benefit the recipient if to do so would leave brothers and sisters impoverished.

We also concur with the eighth circuit that Congress intended § 602(a)(38) to be enforced notwithstanding the representative payee provision of Title II. Congress expressly referred to § 405(j), which governs the certification of representative payees and contains the use and benefit restriction. Congress's reference to § 405(j) suggests that it intended to reconcile any possible incongruence between the implementation of section 602(a)(38) and section 405(j). It follows then that a representative payee will not be subject to criminal sanctions for including Title II payments in the family income. *See Gorrie,* 809 F.2d at 518.

The Secretary's interpretation of the DEFRA amendment accords with legislative history. The Senate Report states that § 602(a)(38) would "end the present practice whereby families exclude members with income in order to maximize family benefits and will ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole." S. Rep. No. 494, 97th Cong., 2d Sess. 47, *reprinted in* 1982 U.S. Code Cong. & Admin. News 781, 823.

The parents claim that Congress rejected the Secretary's interpretation in 1986. Specifically, the Senate proposed an amendment to DEFRA as part of the Tax Reform Act of 1986 which would have removed all doubt that Title II payments were to be included in determining a family's AFDC eligibility. *See* S. Rep. No. 313, 99th Cong., 2d Sess. 1075 (1986). But the House conferees did not accept this amendment.

We do not subscribe to the parents' theory. The Conference Committee Report specifically stated that "the agreement does not include that portion of the Senate amendment concerning Title II benefits and certain child support payments. No inference is intended with regard to

current federal regulations implementing Section 402(a)(38) of the Social Security Act [42 U.S.C. § 602(a)(38)]." H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. 854, *reprinted in* 1986 U.S. Code Cong. and Admin. News 4942. The Secretary's regulation challenged in this suit was in effect in 1986. We conclude that the conferees intended that their refusal to adopt the Senate amendment should not be construed as a disagreement with the Secretary's regulations interpreting the DEFRA amendment. *Cf.* National Muffler Dealers Assoc. v. United States, 440 U.S. 472, 486 (1979).

We hold that the Secretary's interpretation of the DEFRA amendment to the AFDC program is reasonable, and we affirm the district court's grant of summary judgment.

III

The Secretary cross-appeals the district court's grant of summary judgment holding that the Secretary's refusal to disregard as income the first $50 of Title II social security child benefits is not authorized by 42 U.S.C. § 602(a)(8)(A)(vi). The statutory provision in question states:

> . . . in making the [eligibility] determination under paragraph (7), the State agency . . . (vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under §457(b)) [42 U.S.C. § 657(b)].

42 U.S.C. § 602(a)(8)(A)(vi). Resolution of this issue turns upon the definition of child support payments. The question is whether social security payments are child support payments within the meaning of § 602(a)(8)(A)(vi). Con-

gress has offered no answer to this question, and the Secretary has not issued a regulation pertaining to it.

In construing legislation, it is our duty to provide ordinary meaning to ordinary words. Burns v. Alcala, 420 U.S. 575, 580-81 (1975). Moreover, "[i]t is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 631-32 (1973). Finally, if one among alternative constructions would involve serious constitutional difficulties that interpretation should be rejected in favor of another. United States v. Clark, 445 U.S. 23, 33-34 (1980); United States v. Harriss, 347 U.S. 612, 618 n.6 (1954). With these principles of statutory construction in mind, we address the Secretary's arguments.

In contending that child support payments do not include social security payments, the Secretary relies on the legislative history of a predecessor statute. Congress initially created the $50 disregard in 1974 to provide an incentive to a custodial mother to obtain child support from the child's father. *See* S. Rep. No. 1356, 93rd Cong., 2d Sess. 23, *reprinted in* 1974 U.S. Code Cong. & Admin. News 8133, 8155.

It is axiomatic that the intent of one Congress cannot be inferred from the activities of another Congress. United States v. Price, 361 U.S. 304, 313 (1960). In 1974, AFDC recipient cooperation was not a prerequisite to receiving benefits. Also, at that time social security payments were not a factor in determining a family's eligibility for AFDC, so there was no occasion for Congress to consider whether the disregard should also apply to such payments. In 1984 when the current provision was adopted, cooperation was a prerequisite, and AFDC recipients had existing incentives to cooperate in ensuring that child support payments

were made. Moreover, amendments to 42 U.S.C. § 658 have enhanced the states' incentives for tracking down nonresident parents who are delinquent in making child support payments. The Secretary's argument that the $50 disregard serves as a financial impetus is substantially eviscerated by legislative acts of the past 14 years, and it is unsupported by the legislative history of the current provision.

The only pronouncement about the purpose of the current disregard provision has come from the Supreme Court which reasoned that the disregard of the first $50 paid by a father serves to mitigate the burden of the changes wrought by the DEFRA amendments. Bowen v. Gilliard, 107 S. Ct. 3008, 3013 (1987).[3] Although the question of Title II payments was not before the Court, it is apparent that disregard of the first $50 of social security payments, which are received in lieu of payments made by a father, serves the same purpose.

The Secretary suggests that Congress did view child support and social security benefits as distinct items because it noted that under the law in effect before § 602(a)(38), "a family might choose to exclude a child who is receiving social security or child support payments." S. Rep. No.

[3] *Gilliard* upheld the constitutionality of the DEFRA amendment with respect to payments made by a noncustodial parent. Speaking of the $50 disregard, the Court said:

> Because the 1984 amendments forced families to include in the filing unit children for whom support payments were being received, the practical effect was that many families' total income was reduced. The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the State must be remitted to the family and not counted as income for the purpose of determining its benefit level. (footnotes omitted)

107 S. Ct. at 3013.

494, 97th Cong., 2d Sess. 47, *reprinted in* 1982 U.S. Code Cong. & Admin. News 781, 823. The Secretary reasons that if Congress distinguished between child support payments and social security payments in discussing their inclusion in "income," then Congres arguably distinguished between them for purposes of the income disregard provision.

This argument is not without force, *see* Todd v. Norman, 840 F.2d 608, 611 (8th Cir. 1988) (no disregard for social security payments), but we conclude that the suggested inference is simply too tenuous to support the Secretary's interpretation which is not only irrational but also implicates serious equal protection concerns.[4]

We perceive no distinction between support derived directly from a father's wages and support provided indirectly through Title II payments. In both cases, it is the father, a wage earner, whether current or past, who provided the support. The money to support the child comes directly through the father or indirectly through insurance he earned when working. In each instance the $50 disregard would serve the purpose the Supreme Court identified in *Gilliard*, 107 S. Ct. at 3013.

In Ledbetter v. Foster, 350 S.E.2d 31, 33 (Ga. App. 1986), the only state court decision of which we are aware that has addressed this issue, the court defined the term "child support" in 42 U.S.C. § 602(a)(8)(A)(vi) to include social security payments. A number of other state courts have held that an absent parent's child support obligation is fulfilled by insurance benefits paid by social security on behalf of the parents. *See, e.g.*, Binns v. Maddox, 57 Ala. App. 230, 327 So. 2d 726 (1976); Children & Youth Servs.

[4] The parents challenged the Secretary's interpretation on equal protection grounds, but the district court based its decision on statutory construction grounds only. Because we affirm, we find no occasion to decide the constitutional issue.

v. Chorgo, 341 Pa. Super. 512, 491 A.2d 1374 (1985); Justice v. Scruggs, 286 S.C. 165, 332, S.E.2d 106 (1985). Moreover, Virginia recognizes Title II benefits as child support by statute. Section 20-61 of the Virginia Code imposes criminal sanctions on absent parents who fail to support their minor children but exempts parents of children who have qualified for and are receiving benefits under a federal aid to the permanently and totally disabled. Va. Code Ann. § 20-61 (Repl. Vol. 1983).

AFDC families with children who receive social security payments are burdened by the DEFRA amendments no less than families with children who receive payments from noncustodial fathers. No rational basis exists for according one class of families the mitigating benefit of the disregard provision while depriving another arguably indistinguishable class of families of the same benefit. *See* Todd v. Norman, 840 F.2d at 616 (Lay, C.J., dissenting). This sort of unreasoned distinction raises equal protection concerns. *See* Clark v. Jeter, 108 S. Ct. 1910, 1914 (1988). Interpretation of the statute to include child social security payments within the phrase "child support payments" is fair and reasonable and is in accord with the principle that:

> Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

International Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961).

We therefore conclude that social security payments are entitled to the $50 disregard under § 602(a)(8)(A)(vi).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action 86-0398-R

KAREN B. CARTER, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, ET AL., DEFENDANTS

[Filed Dec. 21, 1987]

MEMORANDUM OPINION

This class action suit is before the Court on the parties' cross motions for summary judgment. The plaintiffs challenge the constitutionality of federal regulations and the corresponding Virginia rules which purport to implement the changes made to the Aid to Families with Dependent Children program (AFDC) by section 2640(a) of the Deficit Reduction Act of 1984, codified at 42 U.S.C. § 602(a)(38). In light of the Supreme Court's decision in *Bowen v. Gilliard*, 483 U.S. ____, 97 L.Ed.2d 485 (1987), the plaintiffs voluntary dismissed the claims of children receiving child support payments and the claims of non-custodial parents who were paying child support. Two issues remain to be resolved. First, does the inclusion Title II Social Security benefits in the AFDC family unit's in-

come constitute an involuntary diversion of the benefits in violation of the anti-alienation provision of the Social Security Act and in violation of the Act's provisions governing the fiduciary duties of representative payees? Second, if the benefits are included in the family income for the purposes of AFDC, does the defendants' refusal to disregard as income the first $50 of their Social Security benefits violate both the Social Security Act and the Constitution's guarantees of Equal Protection under the law?

The Secretary's inclusion of Social Security benefits does not violate either the Act's anti-alienation provision or the representative payee provisions. DEFRA legally reduced government spending in this area. The Secretary did err, however, in refusing to allow families receiving Social Security benefits the same $50 remittance received by AFDC families paid child support.

Facts

As a part of its major effort to reduce the federal deficit through DEFRA, Congress amended AFDC to require that a family's eligibility for benefits must take into account the income of all parents, brothers and sisters living in the same home. *Gilliard* addressed the case of child support payments. The parties here address the case where a child receives benefits from the Child's Insurance Benefit Program which is part of Title II of the Social Security Act.

In this instance, the Stroop family is the representative plaintiff. Elizabeth Stroop and her three children live in Harrisburg. Two of her children, Melissa and Brett, each receive $319 per month in Social Security dependent's benefits because their father is disabled. The checks are made payable to Elizabeth Stroop as Representative Payee for Melissa and Bret, and she files a "Representative Payee

Report" with Social Security once a year to verify that the Social Security payments were either spent or saved for Melissa and Bret. Elizabeth and her youngest child Jamie, the daughter of her second husband, receive $231 each month from the AFDC program. Under the amended statute and regulations Melissa and Bret must apply for AFDC, and their Social Security benefits will be counted as part of the family's income. Consequently, the family will no longer qualify for AFDC. The family's income will drop from $869 to $638 (26%). Because of her duties as representative payee, Ms. Stroop also fears criminal prosecution if she uses the funds to support Jamie and herself.

The amendment in question states that a state plan shall:

> provide that in making the determination under paragraph (7) [which sets forth the calculation for eligibility] with respect to a dependent child and applying paragraph (8) [which delineates types of income that are to be disregarded], the State agency shall (except as otherwise provided in this part) include:
>
> > (A) any parent of such child and (B) any brother or sister of such child, if such brother or sister meets the conditions described in clause (1) and (2) of section 406(a) [which defines dependent child], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding Section 204(j) [allowing for payments to representative payees] in the case of benefits provided under Title II); . . .

42 U.S.C. § 602(a)(38)

The Anti-Alienation and Representative Payee Provisions

Plaintiffs argue that inclusion of Social Security benefits in the AFDC calculation violates the "anti-alienation" provision and the representative payee provisions of Title II of the Social Security Act.

The anti-alienation clause provides:

> The right of any person to any future payment under this Subchapter shall not be transferable or assignable, at law or equity, and none of the money paid or payable or rights existing under this Subchapter, shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a)

The dispute focuses on the scope and meaning of "legal process." Courts in other circuits have narrowly construed the phrase and concluded: "The regulation resulted in an inclusion of income, not an assignment or transfer of Title II benefits." *Gorrie v. Bowen*, 809 F.2d 508, 517 (8th Cir. 1987). *See also Creaton v. Bowen*, 826 F.2d 6 (9th Cir. 1987); *Oliver v. Ledbetter,* 821 F.2d 1507 (11th Cir. 1987). Section 407(a) addresses instances where the beneficiary are deprived of the use and control of his Social Security benefits. The challenged amendments make no such depravation.

The plaintiffs' assert that § 407(a) applies not just to legal process, but to any involuntary transfers. They note that where Congress wants to waive the application of the anti-alienation provision, it usually does so by express reference. *See* 42 U.S.C. § 659(a) (providing for the garnishment of Social Security benefits for support purposes). Congress did not make such an express waiver in 42 U.S.C. § 602(a)(38).

Although the plaintiff's interpretation of the statute is plausible, the construction of the statute by the agency charged with its administration is entitled to considerable deference, and must be followed by the courts unless there are "compelling indications that [the agency interpretation] is wrong," *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969), or that it is "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). By implication, the Secretary of Health and Human Services has decided that the anti-alienation provision does not apply. There is no evidence to suggest that this interpretation is wrong. Moreover, the plaintiffs do not cite any case law for the propositions that the provision applies to "involuntary transfers" and that the decision faced by the Social Security recipient, as difficult as it may be, rises to the level of an "involuntary transfer."

Plaintiffs also assert that the Secretary's interpretation of § 602(a)(38) conflicts with 42 U.S.C. § 408(e) which makes if a crime for a payee to use Title II payments for a purpose other than the "use and benefit" of the beneficiary. They argue that counting Title II benefits as available to the entire family forces the representative payees to use Title II benefits for family members other than the beneficiary, thus causing them to violate their representative duties. The Supreme Court in *Gilliard* rejected this argument in the context of child support payments, and the Court's reasoning is applicable here: "An assumption that child support payments to families receiving AFDC benefits are typically used for the entire family's needs is entirely reasonable. . . For the requirement that the support income be used for the 'benefit' of the child does not preclude its use for common expenses. Moreover, the custodial parent's duty to benefit the supported child is not necessarily served simply by spending more money on him or her than on other children living in

the same home." *Gilliard*, 483 U.S. at ____, 97 L.Ed.2d at 500 n.14. Also, section 602(a)(38) by its own terms is to be enforced notwithstanding the representative payee provisions of Title II. Congress made parenthetical reference to 42 U.S.C. § 405(j) which governs the certification of representative payees and contains the "use and benefit" restriction. The court agrees with the Eighth Circuit's determination that "Congress resolved the potential conflict by providing that the statutory obligations of the representative payee should not be applied to interfere with the operation of § 602(a)(38). It readily follows that the criminal sanctions of § 408(e) are unenforceable in such circumstances." *Gorrie v. Bowen*, 809 F.2d 508, 518 (8th Cir. 1987) (citations omitted).

$50 Disregard Provision

Under the defendants' current regulations the Government remits the first $50 of child support payments to the AFDC family but refuses to grant the same rebate to a family receiving Social Security benefits. The $50 disregard provisions provides:

> . . . in making the [eligibility] determination under paragraph (7), the State agency . . . (vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under § 457(b) [42 U.S.C. 657(b)]

42 U.S.C. § 602(a)(8)(A)

It is contradictory to treat Social Security benefits like child support for the purposes of including them in family income and then in another part of the same statute treat them differently from child support payments for the pur-

pose of excluding a family from a potential $50 rebate. Although DEFRA was designed to reduce government spending, the law does not empower the Secretary to make self-serving irrational distinctions. A family's eligibility for the $50 remittance should not turn upon the absent father's ability to work. For example, the law should not allow a family to receive the $50 rebate when a child is supported by a working father, but deny that family the rebate when the father becomes disabled and must provide the support indirectly through Social Security benefits. *See Davis v. Salee*, No. CIV-4-86-27 (E.D. Tenn. Oct. 10, 1986). There is no apparent rational justification for such a distinction.

The defendants' argue that in the case of child support payments, the $50 remittance is an incentive for the family to cooperate in the collection of child support. The Government bears the risk that the responsible parent will fail to pay child support and force the Government to pay the full AFDC amount without the benefit of an offset. The $50 disregard provides an incentive, argue the defendants, for the family to pressure the non-resident parent to make child support payments. No similar incentive is necessary for the AFDC family whose children receive Social Security benefits because there is no action the state can take to collect such benefits. *Todd v. Reagan*, Civil No. 85-300-A (S.D. Iowa December 22, 1986) appeal pending No. 87-1251 (8th Cir.)

No legislative history for § 602(a)(8)(A)(vi) exists to support the defendants' incentive argument. In *Todd v. Reagan*, supra, a case relied on by the defendants, the court referred to the legislative history of the predecessor of § 602(a)(8)(A)(vi), and determined that "the purpose of the disregard was to create a financial incentive to AFDC recipients to assist the state in collecting child support." *Id.* at 4. Not only is it improper to infer one Congress' intent from the activities of another Congress, *United States v. Price*, 361 U.S. 304, 313 (1960), but the legal requirements placed on the AFDC family have changed. In 1974 when the predecessor section was enacted recipient cooperation was not a requisite to receiving AFDC aid. In 1984, cooperation was a requisite, and the AFDC recipients had existing incentives to ensure that child support payments were made. Moreover, amendments to 42 U.S.C. § 658 have enhanced the states' incentives for tracking down non-resident parents who are delinquent in making child support payments. The argument that the $50 disregard provision provides a financial incentive has lost much, if not all, of its force in the intervening thirteen years.

The Supreme Court in *Gilliard* suggested that the purpose of the $50 disregard provision is to mitigate the family's reduction in benefits. In describing the 1984 DEFRA amendments, the Court wrote: "The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the state must be remitted to the family and not counted as income for the purpose of determining its benefit level." *Gilliard*, 483 U.S. at ____, 97 L.Ed.2d at 496-97. Since AFDC families with children supported by Social Security bear the same "burden of change" as do families with children supported by child support payments, Social Security families deserve the same benefit of mitigation provided by 42 U.S. § 602(a)(8)(A)(vi).

The defendants' also argue that if Social Security benefits fall within the meaning of the provision's "any child support," then all AFDC benefits are a form of "child support" and everyone should get the $50 remittance. The defendants fail to see the distinction between AFDC benefits—a welfare benefit which is set according to number of members in one's family—and child support

and Social Security benefits which are derived from the parent's earning capacity. For this reason, many states have considered Social Security benefits a type of "child support" *See e.g., Ledbetter v. Foster*, 350 S.E.2d 31 (Ga. App. 1986).

Although the construction of a statute by an agency charged with its administration is entitled to considerable deference, the Secretary's interpretation of § 602(a)(8)(A)(vi) appears to be "demonstrably irrational." *Ford Motor Credit Co.* v. *Milholin*, 444 U.S. 555, 565 (1980). The "any child support" language in 42 U.S.C. § 602(a)(8)(A)(vi) includes Social Security benefits paid to children of families receiving AFDC. To limit the phrase to only state ordered child support payments would be irrational. The applicability of the $50 disregard provision should not turn upon the health of the supporting parent. Rather the purpose of the provision is to mitigate the hardship imposed by the DEFRA amendments to the AFDC program. Whether the AFDC families include children receiving child support payments or Social Security benefits, the families suffer equally under the DEFRA amendments. Hence the families should also equally enjoy the same limited relief provided by the Act's disregard provision.

Having resolved the matter on the basis of statutory construction, the Court sees no need to address the Equal Protection argument.

Let the Court send a copy of this memorandum opinion to all counsel of record.

21 Dec 1987 /s/ Richard L. Williams
DATE RICHARD L. WILLIAMS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action 86-0398

KAREN B. CARTER, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, ET AL., DEFENDANTS

[Filed Mar. 4, 1988]

MEMORANDUM OPINION

This matter is before the Court on the federal defendant Otis R. Bowen's motion to alter or amend the Court's December 21, 1987 judgment pursuant to Fed. R. Civ. P. 59(e). For the reasons set forth below, the defendant's motion is denied.

The federal defendant challenges the Court's interpretation of "child support payments" in 42 U.S.C. § 602(a)(8)(A)(vi) to include Social Security Children Insurance Benefits. Bowen contends that such Social Security benefits are not entitle to the benefit of the $50 disregard provision of the Deficit Reduction Act of 1984 (DEFRA). 42 U.S.C. § 602(a)(8)(A)(vi). Only child support payments collected by the states fall within the

parameters of this section, suggests Bowen. The Court expressly rejected this view in its earlier decision, noting:

> It is contradictory to treat Social Security benefits like child support for the purpose of including them in family income and then in another part of the same statute treat them differently from child support payments for the purpose of excluding a family from a potential $50 rebate. Although DEFRA was designed to reduce government spending, the law does not empower the Secretary to make self-serving, irrational distinctions. A family's eligibility for the $50 remittance should not turn upon the absent father's ability to work. For example, the law should not allow a family to receive the $50 rebate when a child is supported by a working father, but deny that family the rebate when the father becomes disabled and must provide the support indirectly through Social Security benefits. *See Davis v. Salee*, No. CIV-4-86-27 (E.D. Tenn. Oct. 10, 1986). There is no apparent rational justification for such a distinction.

Memorandum Opinion at 7.

The Government argues there are several rational justifications for treating child support payments differently from Social Security benefits. First, the $50 disregard and pass-through encourages the custodial parent to cooperate and identify for state authorities the non-custodial parent who should be paying child support. Second, the non-custodial parent is more likely to pay child support if he knows that his children will receive a $50 bonus for his cooperation. These incentives are not present where the Federal government pays Social Security benefits directly to the recipients.

Although there is no legislative history to the DEFRA amendments in question, the Government rests its argu-

ment on the legislative history of the predecessor of § 602(a)(8)(A)(vi). The earlier provision was enacted in 1974 and provided that 40% of the first $50 collected on the monthly support obligation would be paid to the family without affecting their AFDC eligibility. 42 U.S.C. § 647(a)(1) (1974). The disregard provision was enacted to encourage AFDC recipients' cooperation in the collection of child support payments. *See* Senate Report 93-1356, 93rd Cong., 2d Sess., *reprinted* at 1974 U.S. Code Cong. and Admin. News 8155.

Also as part of the 1974 amendments to the Social Security Act, all AFDC recipients were required to assign to the State any support rights they had in their own behalf or on behalf of their dependents who were also recipients of AFDC. They were also required to cooperate with the State in establishing and enforcing support obligations. Social Services Amendments of 1974, Pub. L. 93-647, section 101(a) et seq.

Hence in 1974, Congress created at least two means of improving parental support of AFDC recipients: the disregard provision and mandatory assignment and cooperation amendments. By the end of the next year, Congress in effect elected between the two means. The disregard provision was phased out, and the mandatory assignment and cooperation provisions remained. Therefore, when the disregard provision was reintroduced as part of DEFRA, the legal landscape of parental support for AFDC recipents was completely different from that in 1974. In 1974, recipient cooperation was not a requisite to receiving AFDC benefits. The assignment and cooperation provisions were enacted simultaneously with the disregard provision. By 1984, however, the assignment and cooperation requirements

had been in place for a decade and obviated the need for additional financial incentives for cooperation.[1]

There is absolutely no legislative history to support the federal defendant's view that Congress enacted the disregard provision in 1984 as an added incentive to the custodial parent to cooperate in identifying a parent from whom support payments could be obtained. Such incentives were well established in 1984. Similarly, the Government is correct in arguing that there is no legislative history supporting the Court's holding that the $50 disregard applies to Social Security benefits as well. The simple truth is that there is no legislative history to these DEFRA amendments.

Nonetheless, § 602(a)(8)(A)(vi) must be interpreted to include Social Security benefits to avoid an anomalous result that Congress could not have intended. The DEFRA amendments operate to change the income counting requirements for AFDC families. A family which includes children living in the same household that receive either child support payments or Social Security benefits must include those benefits in the family income for purposes of calculating eligibility for AFDC benefits. It is irrelevant for the purposes of calculating AFDC eligibility and benefits whether the $400 a child receives is child support or

[1] The Government correctly points out that the Court mistakenly relied on 42 U.S.C. § 658 as an example of states receiving increased incentives to track down parents who are delinquent in making child support payments. States' incentives under § 658 have in fact decreased since 1974. There are other areas, however, where states' incentives have increased to ensure that parents make child support payments. For example, if a state welfare agency is persistent and discovers the parent owing child support, the agency may be reimbursed for support payments from the seizure of that parent's federal tax refund. 42 U.S.C. § 664 (1982). *See Presley v. Regan*, 604 F.Supp. 609 (N.D.N.Y. 1985).

Social Security benefits. The $400 is still $400 in family income.

The law should be equally blind for the purposes of excluding these benefits from the family's income. Whether the $400 is child support or Social Security benefits should not matter for purposes of disregarding the first $50 of such income and passing it through to the family. If the DEFRA amendments were intended to distinguish between the sources of additional income to the family, the availability of the $50 disregard benefit would turn upon the health of the absent parent. As noted earlier, if the absent parent is healthy and provides child support, the family receives the benefit of the $50 disregard. If this same father, however, becomes disable, the family may well receive the same amount in monthly income but lose the benefit of the $50 disregard.

More likely, the DEFRA disregard provision was intended to mitigate the hardship caused some families by DEFRA's new definitions of family income. This conclusion is supported by the Supreme Court's statement in *Bowen v. Gilliard*: "The burden of [DEFRA] was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the state must be remitted to the family and not counted as income for the purposes of determining the benefit level." 483 U.S. __, 97 L.Ed.2d. 485, 496-97.

For these reasons, defendant Bowen's motion to alter or amend the Court's prior judgment is denied.

Let the Clerk send a copy of this final order to all counsel of record.

04 Mar. 1988 /s/ Richard L. Williams
Date RICHARD L. WILLIAMS
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action 86-0398

KAREN B. CARTER, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, ET AL., DEFENDANTS

[Entered Dec. 21, 1987]

FINAL ORDER

This matter is before the Court on the parties' cross motions for summary judgment pursuant to Fed. R. Civ. P. 56 to determine the validity of the federal regulatoins and the corresponding Virginia rules which purport to implement the changes made to the Aid to Families with Dependent Children program by section 2640(a) of the Deficit Reduction Act of 1984, codified at 42 U.S.C. § 602(a)(38).

The plaintiffs' statutory and constitutional claims of children receiving child support payments and the claims of the non-custodial parents who are paying child support are voluntarily DISMISSED pursuant to Fed. R. Civ. P. 41(a)(2).

For the reasons stated in the accompanying memorandum opinion:

The portion of the defendants' summary judgment motion which addresses the inclusion of children receiving Title II Social Security benefits in the AFDC assistance unit is GRANTED. The portion of the plaintiffs' summary judgment motion which challenges the inclusion on statutory and constitutional grounds is DENIED.

The portion of the defendants' summary judgment motion which asks the Court to uphold the Secretary's refusal to disregard the first $50 of Social Security benefits paid to AFDC families pursuant to 42 U.S.C. § 602(a)(8)(A)(vi) is DENIED, and that part of the plaintiffs' summary judgment motion challenging the Secretary's interpretation of 42 U.S.C. § 602(a)(8)(A)(vi) is GRANTED.

The Temporary Restraining Order imposed by the Court's orders dated June 23 and July 2, 1986 is hereby VACATED.

Let the Clerk send a copy of this final order to all counsel of record.

21 Dec. 1987 — Date

/s/ Richard L. Williams
RICHARD L. WILLIAMS
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action No. 86-0398

KAREN B. CARTER, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, ET AL., DEFENDANTS

[Entered Mar. 4, 1988]

FINAL ORDER

This matter is before the Court on the federal defendant Otis R. Bowen's motion to alter or amend the Court's December 21, 1987 judgment pursuant to Fed. R. Civ. P. 59(e).

For the reasons stated in the accompanying memorandum opinion, the defendant's motion is DENIED.

Let the Clerk send a copy of this final order to all counsel of record.

04 Mar. 1988 /s/ Richard L. Williams
Date RICHARD L. WILLIAMS
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-2530

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRET LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT

and

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, DEFENDANT

v.

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

No. 88-2538

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRET LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES; OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES

v.

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

No. 88-2530

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRET LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT

and

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, DEFENDANT

v.

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

No. 88-2538

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRET LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES; OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES

v.

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

[Filed May 31, 1989]

ORDER

The appellant/cross appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Murnaghan and Judge Chapman.

For the Court,

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

APPENDIX G

Statutory and regulatory provisions

42 U.S.C. 602 (Supp. V 1987):

State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents

A State plan for aid and services to needy families with children must –

* * * * *

(7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency –

(A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid;

* * * * *

(8)(A) provide that, with respect to any month, in making the determination under paragraph (7), the State agency –

* * * * *

(vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title); and

42 U.S.C. 657 (Supp. V 1987):

Distribution of proceeds

* * * * *

(b) Amount collected during any fiscal year beginning after September 30, 1976

The amounts collected as support by a State pursuant to a plan approved under this part during any fiscal year beginning after September 30, 1976, shall (subject to subsection (d) of this section) be distributed as follows:

(1) the first $50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;

* * * * *

The Family Support Act of 1988, Pub. L. No. 100-485, § 102, 102 Stat. 2346 provides:

DISREGARD APPLICABLE TO TIMELY CHILD SUPPORT PAYMENTS.

(a) IN GENERAL.—Section 402(a)(8)(A)(vi) of the Social Security Act is amended by striking "of any child support payments received in such month" and inserting in lieu thereof "of any child support payments for such month received in that month, and the first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due,".

(b) CONFORMING AMENDMENT.—Section 457(b)(1) of such Act is amended by striking "the first $50 of such amounts as are collected periodically which represent monthly support payments" and inserting in lieu thereof

"of such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due,".

(c) EFFECTIVE DATE.—The amendments made by this section shall become effective on the first day of the first calendar quarter which begins after the date of the enactment of this Act.

42 U.S.C. 402 (1982 & Supp. V 1987):

Old-age and survivors insurance benefit payments.

* * * * *

(d) Child's insurance benefits

(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of any individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled

to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with—

(i) in the case of a child (as so defined) of such an individual who has died, the first month in which such child meets the criteria specified in subparagraphs (A), (B), and (C), or

(ii) in the case of a child (as so defined) of an individual entitled to an old-age insurance benefit or to a disability insurance benefit, the first month throughout which such child is a child (as so defined) and meets the criteria specified in paragraphs (B) and (C) (if in such month he meets the criterion specified in paragraph (A)),

whichever is earlier, and ending with the month preceding whichever of the following first occurs—

(D) the month in which such child dies or marries,

(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time elementary or secondary school student during any part of such month,

(F) if such child was not under a disability (as so defined) at the time he attained the age of 18, the earlier of—

(i) the first month during no part of which he is a full-time elementary or secondary school student, or

(ii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month; or

(G) if such child was under a disability (as so defined) at the time he attained the age of 18, or if he was not under a disability (as so defined) at such time but was under a disability (as so defined) at such time but was under a disability (as so defined) at or prior to the time he attained (or would attain) the age of 22,—

(i) the termination month subject to section 423(e) of this title (and for purposes of this subparagraph, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 422(c)(4)(A) of this title, the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which he engages or is determined able to engage in substantial gainful activity),

or (if later) the earlier of—

(ii) the first month during no part of which he is a full-time elementary or secondary school student, or

(iii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month.

Entitlement of any child to benefits under this subsection on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits shall

also end with the month before the first month for which such individual is not entitled to such benefits unless such individual is, for such later month, entitled to old-age insurance benefits or unless he dies in such month. No payment under this paragraph may be made to a child who would not meet the definition of disability in section 423(d) of this title except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity.

* * * * *

Section 232.20 of 45 C.F.R. provides in pertinent part:

Treatment of child support collections made in the Child Support Enforcement Program as income and resources in the Title IV-A Program.

(a) *Definition.* For purposes of this section, notwithstanding any other regulations in this chapter, support collections, monthly collections and support amounts for a month mean the assigned amount that the support enforcement agency collects from an absent parent or spouse on a monthly support obligation, less the disregarded sum under § 305.51(b)(1).

* * * * *

(d) The State plan must provide that the IV-A agency, on behalf of the IV-D agency, will promptly pay to the family the sum disregarded under § 305.51(b)(1).

Section 302.51 of 45 C.F.R. provides in pertinent part:

Distribution of support collections.

The State plan shall provide as follows:

* * * * *

(b) The amounts collected as support by the IV-D agency pursuant to the State plan for children and the parents of such children who are current recipients of aid under the State's title IV-A plan and for whom an assignment under § 232.11 of this title is effective shall be distributed as follows:

(1) Of any amount that is collected in a month which represents payment on the required support obligation for that month, the first $50 of such amount shall be paid to the family. This payment may not be used in determining the amount paid, if any, to the family in paragraph (b)(3) of this section. If the amount collected includes payment on the required support obligation for a previous month or months, the family shall only receive the first $50 of the amount which represents the required support obligation for the month in which the support was collected. If amounts are collected for one family which represent support payments from two or more absent parents, only the first $50 of the amount collected which represents the total required support obligation for the month in which the support was collected shall be paid to the family under this paragraph. No payment shall be made to a family under this paragraph for a month in which there is no child support collection.

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No. 89-535

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LOUIS W. SULLIVAN, Secretary
U.S. Department of Health and Human Services,

Petitioner,

v.

ELIZABETH STROOP, et al.,

Respondents

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTION PRESENTED

Whether, in determining eligibility and assistance levels under the Aid to Families with Dependent Children (AFDC) program, the Secretary's refusal to disregard the first $50 per month of Title II Social Security payments received by children residing in AFDC households, while applying such a disregard to other forms of child support, creates an irrational distinction that violates the Social Security Act of 42 U.S.C. Section 602(a)(8) and the constitutional guarantee of Equal Protection under the laws.

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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the statutes and regulations cited in the Petition at 2, the Fifth Amendment to the United States Constitution, set forth in the Respondents' Appendix at 1a, is also involved.

STATEMENT OF THE CASE

The Secretary of Health and Human Services is seeking review of the Fourth Circuit's determination that his refusal to disregard as income the first $50 per month of Title II Social Security child benefits in determining eligibility and assistance levels under the AFDC program is not authorized by 42 U.S.C. Section 602(a)(8)(A)(vi). His statement of the case omits discussion of relevant aspects of the program, mischaracterizes the nature of the Respondents' action, overstates this Court's holding in Bowen v. Gilliard, 483 U.S. 587 (1987) and misrepresents the bases of the opinions of the courts below. Because of these inaccuracies and omissions, Respondents Elizabeth Stroop, et al., present this statement of the case.

The AFDC program is a joint federal-state public assistance program designed to provide financial assistance to needy and dependent children and to encourage and preserve a family environment, 42 U.S.C. Section 601, Reed v. Lukhard, 774 F.2d 1270, 1275 (4th Cir. 1985), rev. on other grounds, 481 U.S. 368 (1987), 107 S.Ct. 1807, 95 L.Ed.2d 328 (1987). States that choose to participate in the AFDC program must establish statewide "standards of assistance" which reflect the minimum dollar amount that, in the state's judgment, an AFDC family requires to meet its subsistence needs. Shea v. Vialpando, 416 U.S. 251, 253, (1974), 45 C.F.R. Section 233.20 (a)(2).

The AFDC program is not designed to provide support for all needy children but only for those children who are "dependent" within the meaning of 42 U.S.C. Section 606(a). See King v. Smith, 392 U.S. 309, 313 (1968). To meet the definition of "dependency" contained in that section, a child must, in addition to showing need, also establish that he or she is experiencing deprivation of parental support or care because one or both parents have died, is absent from the child's home, or is incapacitated. 42 U.S.C. Section 606(a). In determining whether a dependent child is also needy, the state must consider the available income and resources of the child and the custodial parent. 42 U.S.C. Section 602(a)(7)(A); 45 C.F.R. Section 233.20(a)(3)(vi).

When a child receives AFDC assistance, cooperation in the collection of legally owed child support is a condition of eligibility and the right to the child support must be assigned to the state. 42 U.S.C. Section 602(a)(26), 45 C.F.R. Section 232.11(a)(1)(i). A state agency acting pursuant to Title IV-D of the Social Security Act, 42 U.S.C. Section 651 et seq., administers the child support collection efforts. However, child support monies can be received directly by the family as well, see 45 C.F.R. Section 303.80(a), and states have the option of either collecting these direct payments from the recipients, often referred to as the "IV-D" option, or not collecting such payments but treating them as income in calculating the AFDC grant, called the "IV-A" option. Id. at Sections 233.20(a)(3)(v)(B), 302.31(a)(3) and 303.80.

Section 2640(a) of the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 494, amended the Social Security Act at 42 U.S.C. Section 602(a)(38) to provide that, except where inconsistent with the AFDC statute, the income of

a sibling of a needy child must be considered in determining the AFDC eligibility of that needy child. Section 2640(c) of DEFRA, 98 Stat. 1146, mitigated the effect of this amendment somewhat, see Bowen v. Gilliard, 483 U.S. 587, 107 S.Ct. 3008 at 3013, by providing that the first $50 of "any child support payments ... (including support payments collected and paid to the family under [42 U.S.C. Section 657(b)])" be disregarded in determining eligibility and benefit amount, 42 U.S.C. Section 602(a)(8)(A)(vi).

Regulations promulgated by the Secretary purporting to implement the "sibling deeming" provision require all siblings in the household to apply for AFDC benefits, including children who receive legally restricted Title II Social Security payments, even if they do not need or want AFDC, 49 Fed. Reg. 35,599 (1984), codified at 45 C.F.R. Section 206.10(a)(1)(vii)(B). The regulations implementing the disregard statute exempt the first $50 of only those support monies which are collected by a IV-D agency, 49 Fed. Reg. 35,605-35,606 (1984), codified at 45 C.F.R. Section 302.51(b)(1). Even spousal support payments are entitled to the disregard if they are collected by a state agency, 53 Fed. Reg. 21,642 (1988). No disregard is provided, however, for any support not collected by a IV-D agency, including Title II payments.

This case was filed as a class action by five Virginia families, each of which included children who received AFDC for support and other children who were independently supported by child support paid through Social Security or other sources. They sought to challenge the forcing of their independently supported children onto AFDC and the counting of income previously designated for the exclusive use of those children

as available to the entire family, which would result in the significant reduction or termination of AFDC benefits to the other family members.

On June 23, 1986 the district court entered a temporary restraining order, enjoining the implementation of the challenged rule in Virginia. With consent of all parties, the TRO was extended into a preliminary injunction on July 2, 1986. After cross-motions for summary judgment were filed on November 17, 1986, the district court stayed further proceedings pending the outcome of Britt, et al. v. Bowen, et al., No. 86-3076, consolidated with Massinga v. Bowen, No. 87-3083 in the Fourth Circuit. The Fourth Circuit had likewise stayed further proceedings in Britt and Massinga pending the outcome of Bowen v. Gilliard, supra, in this Court.

Contrary to the Petitioner's assertions, the Gilliard decision did not broadly validate the constitutionality of the "family income requirement." This Court merely held that with regard to children receiving court-ordered child support payments from their absent parents, the DEFRA amendments at issue here did not violate Fifth Amendment due process and equal protection principles nor the Fifth Amendment's taking clause. Not addressed in the decision were the statutory and constitutional claims of children independently supported by Title II Social Security benefits drawn from the earnings of deceased or disabled parents.

Accordingly, the Respondents voluntarily dismissed the claims both of the children receiving court-ordered support and of the non-custodial parents paying such support, but retained the claims of the Title II children that their inclusion in the AFDC assistance unit would constitute an involuntary diversion of their benefits to their needy siblings in violation of the

Anti-Alienation Provision of the Social Security Act, 42 U.S.C. Section 407(a), and that Act's provisions governing the fiduciary duties of representative payees. Respondents also continued to claim that if the inclusion of the Title II children were upheld notwithstanding these provisions, the Secretary's refusal to disregard the first $50 of their monthly benefits violated both the Social Security Act and the Fifth Amendment's guarantee of Equal Protection under the law. Respondents did not drop their challenge to the "family income requirement" as it related to Title II, or argue that Title II benefits were not "income" as the Petitioner suggests.

Following cross-motions for summary judgment, the district court held on December 21, 1987 that children receiving Title II benefits could be forcibly included in the AFDC assistance unit of their half-siblings, Petitioner's Appendix at 14a. The court ruled that such inclusion did not constitute an assignment or transfer of benefits or deprive the beneficiary of the use or control of such benefits and therefore did not violate the Anti-Alienation Provision. Id., citing cases from the Eighth, Ninth and Eleventh Circuits. The court also held, as did those Circuits, that use of Title II payments to benefit the entire family was analogous to Gilliard's approved use of a child's court-ordered support payments for the whole family's needs and therefore did not run afoul of the representative payee provisions of the Social Security Act. Id. at 18a-19a. However, the district court also held that when such Social Security benefits are counted in the AFDC eligibility determination, the same $50 disregard that is applied to other forms of child support applies to them as well. Id. at 19a-20a. The Secretary was found to be making "self-serving, irrational distinctions" in treating such benefits as child

support for the purpose of income inclusion but then, in implementing another part of the same statute, differentiating such benefits from child support so as to exclude them from the disregard. Id. at 20a.

On March 4, 1988, the district court denied the Secretary's motion to alter or amend the court's decision concerning the $50 disregard. Id. at 30a. In a memorandum opinion, the court rejected Petitioner's contention that the legislative history of a 1974 disregard provision, in effect for one year for the purpose of encouraging the then-new requirement that AFDC recipients cooperate with the state in the collection of child support payments, provided a rational justification for applying the present disregard to court-ordered child support, but not to Title II payments. Noting that the cooperation requirement had been in place for a decade by 1984 and that the legislative history of DEFRA contained no mention of any need to provide additional financial incentives, the court again found the distinctions offered by the Secretary to be irrational. Id. at 23a-27a.

The Secretary appealed from the district court's disregard determination on May 3, 1988 and Respondents cross-appealed on May 13, 1988 on the assistance unit ruling. The Fourth Circuit Court of Appeals affirmed on both issues in an opinion filed March 28, 1989. Id. at 1a-13a. The court announced it was joining the Eighth, Ninth and Eleventh Circuits in adapting this Court's analysis in Gilliard to the Title II inclusion issue and thereby rejecting Respondents' anti-alienation and representative payee arguments. Id. at 5a-8a. Finding that the disregard provision served to mitigate the effect of the filing unit provision, the court held that no rational basis existed for the Secretary's applying that mitigating effect to

recipients of court-ordered child support, but not to recipients of Title II child support. Id. at 8a-13a. Contrary to the Petitioner's assertions, the court decided the issue solely on the basis of statutory construction, but it did note in dictum that such disparate treatment also raised equal protection concerns. Id. at 11a, 12a.

On May 31, 1989, the Fourth Circuit denied the Secretary's petition for rehearing and suggestion for rehearing en banc.

ARGUMENT

The Secretary argues that the courts below have interpreted the disregard provision in a way that conflicts with the general statutory usage of the term "child support" and conflicts with the available legislative history. He maintains that appropriate deference was not given to his administrative interpretation. Alleging that this issue has significant fiscal implications and citing the Eighth Circuit's conflicting holding in Todd v. Norman, 840 F.2d 608 (1988), he argues that review and resolution by this Court is essential to the uniform administration of the AFDC program. None of these arguments has merit.

A. TITLE II PAYMENTS ARE SYNONYMOUS WITH THE TERM "CHILD SUPPORT" AS THAT TERM IS COMMONLY USED.

The disregard statute contains no definition of "child support." It provides simply that the first $50 per month of "any" child support is to be exempted, an indication that the term is to be construed very broadly. Support subject to the disregard "includes" (and therefore is not limited to) support collected and paid to the family by the state IV-D agency. 42 U.S.C. Section 602(a)(8)(A)(v). If Congress had wished to limit the types of child support eligible for treatment under this section, it could have easily done so. However, there is

no hint of such limitation either in the legislative history or in the statutory language itself.

The Secretary maintains that the term "child support" is consistently used throughout Title IV of the Social Security Act to refer only to payments from absent parents and he cites numerous sections to support this proposition. Petition at 10, n.6. Examination of these sections reveals, however, that the term "child support" has different meanings within different provisions of the complex statutory scheme of the Act. For instance, one of the cited sections, 42 U.S.C. Section 662(b), provides a definition of "child support" that makes that term "subject to and in accordance with state law." Obviously, such a definition could not be applied across the board, see discussion in Brown v. McMahon, No. CIV.S-87-1581 (E.D. Cal. October 11, 1989) at Respondent's Appendix 16a. Absent a definition in the disregard statute, it should be inferred that Congress intended to incorporate the accumulated, settled established meaning of the term.

An overwhelming number of state courts that have considered the nature of Social Security children's benefits have concluded that they are a form of insurance, earned by the worker and directly attributable to his participation in the work force. Once this characterization is accepted, the benefits are seen not as some gratuity but as a product of the parent's labor that should be credited against any support obligation. At least seventeen states credit such payments against the support obligation automatically.[1] At least

[1]ALABAMA: Binns v. Maddox, 57 Ala. App. 230, 327 So.2d 726 (1976) (disability); Bowden v. Bowden, 426 So.2d 448 (Ala. Ct. App. 1983) (death benefits). ARIZONA: Lopez v. Lopez, 125 Ariz. 309, 609 P.2d 579 (Ct. App. 1980) (retirement benefits). ARKANSAS: Cash v. Cash, 234 Ark. 603, 353 S.W.2d 348 (1962) (retirement benefits). COLORADO: Meek v. Meek, 669 P.2d 628 (Colo. Ct. App. 1983). GEORGIA: Perteet v. Sumner, 246 Ga.

another ten states allow discretionary credit against the obligation on a case-by-case basis -- not because these payments are not recognized as child support, but rather out of a concern that an automatic credit against a support obligation would constitute a modification of the support decree.[2] "Child support" as that term is commonly used clearly encompasses Title II payments.

B. THE LEGISLATIVE HISTORY OF THE 1974 DISREGARD PROVISION HAS NO RELEVANCE TO THE INTERPRETATION OF THE 1984 DEFRA STATUTE.

Both the Secretary and the Eighth Circuit in Todd v. Norman, supra, rely upon legislative history from previous and unrelated AFDC statutory changes to support their position that

182, 269 S.E.2d 453 (1980) (disability). IOWA: Potts v. Potts, 240 N.W.2d 680 (Iowa 1976). KANSAS: Andler v. Andler, 217 Kan. 539, 538 P.2d 649 (1975) (disability). KENTUCKY: Board v. Board, 690 S.W.2d 380 (Ky. 1985) (death benefits). LOUISIANA: Folds v. Lebert, 420 So. 2d 715 (La. Ct. App. 1982) (disability). MASSACHUSETTS: Cohen v. Murphy, 368 Mass. 144, 330 N.E.2d 473 (1975) (disability). MISSISSIPPI: Mooneyham v. Mooneyham, 420 So. 2d 1072 (Miss. 1982) (disability). NEBRASKA: Shulze v. Jensen, 191 Neb., 253, 214 N.W.2d 591 (1974) (disability). Lainson v. Lainson, 219 Neb. 170, 362 N.W.2d 53 (1985) (disability). NEW JERSEY: Potter v. Potter, 169 N.J. Super. 140, 404 A.2d 352 (App. Div. 1979). NEW MEXICO: Mask v. Mask, 95 N.M. 229, 620 P.2d 883 (1980) (retirement). Romero v. Romero, 101 N.M. 345, 682 P.2d 201 (Ct. App. 1984) (disability). PENNSYLVANIA: Children & Youth Servs. v. Chango, 341 Pa. Super. 512, 491 A.2d 1374 (1985) (disability). SOUTH CAROLINA: Justice v. Scruggs, 286 S.C. 129, 332 S.E.2d 106 (S.C. 1985) (disability). VERMONT: Davis v. Davis, 141 Vt. 398, 449 A.2d 947 (1982) (disability).

[2]CONNECTICUT: Fowler v. Fowler, 156 Conn. 569, 244 A.2d 375 (1968) (disability). ILLINOIS: Nakaerts v. Nakaerts, 106 Ill. App. 3d 166, 435 N.E.2d 791 (1982) (death benefits). INDIANA: Brummett v. Brummett, 472 N.E.2d 616 (Ind. Ct. App. 1984) (survivor's benefits). MICHIGAN: Gibson v. Gibson, 110 Mich. App. 666, 313 N.W.2d 179 (1981) (death benefits). MINNESOTA: In re Haynes, 343 N.W.2d 679 (Minn. Ct. App. 1984) (retirement benefits). MISSOURI: Craver v. Craver, 649 S.W.2d 440 (Mo. 1983) (in dicta). NEW HAMPSHIRE: Griffin v. Avery, 120 N.H. 783, 424 A.2d 175 (1980) (disability). NEW YORK: Passaro v. Passaro, 92 A.D.2d 861, 459 N.Y.S.2d 839 (1983) (disability). OKLAHOMA: Nibs v. Nibs, 625 P.2d 1256 (Okla. 1981) (disability). WASHINGTON: Chase v. Chase, 74 Wash. 2d 253, 444 P.2d 145 (1968) (disability).

the 1984 $50 disregard in DEFRA was not intended to apply to child support in the form of Social Security. This analysis is erroneous and contrary to basic principles of statutory construction.

The 1974 legislative change upon which the Secretary relies created, for the first time, the statutory obligation of AFDC applicants and recipients to assign support rights and cooperate with the agency in obtaining child support. 42 U.S.C. Section 602(a)(26)(D). Prior to this amendment, cooperation was not a condition of AFDC eligibility. Indeed, the 1974 statutory amendment actually resolved conflicting judicial rulings on this issue. See, Lascaris v. Shirley, 420 U.S. 730 (1975).

Along with the change, Congress adopted - as a temporary experiment - the limited pass-through of forty percent (40%) of the first $50 of support obtained. 42 U.S.C. Section 657(a)(1). According to the legislative history, this was done because:

> ...The Committee feels it may be desirable to offer the mother a financial incentive to cooperate. To demonstrate the possible effectiveness of the incentives, the Committee bill for the first year of the program provides that forty percent of the first fifty dollars a month in support collections for a family would be disregarded ...

1974 U.S. Code Cong. and Admin. News 8155 (emphasis added). The one-year time limit was actually incorporated in the statutory language. Apparently, the incentives did not prove effective because the disregard ended after the first year.

The Secretary concedes that the 1984 disregard was not explained in any of the 1984 legislative history, Petition at 12. But Congressional silence in 1984 in no way justifies looking back ten years to the purpose of unrelated legislation. "A determination under one statute should not be mechanically

carried over into the interpretation of another statute involving significantly different considerations and legislative purposes." Local 1976, United Brotherhood of C and J v. NLRB, 357 U.S. 93, 110 (1958).

The 1974 legislation was significantly different, because the 1974 disregard was created for a one-year limited period to support the then brand-new cooperation requirement. However, by 1984, the cooperation requirement was a long-standing condition of eligibility which was well-known by recipients. A mother who failed to cooperate knew that she would lose her AFDC. There was therefore no reason in 1984 to provide a financial incentive to cooperate.

Petitioner's reasoning also fails because it ignores circumstances contemporaneous to the 1984 amendment. A statute cannot be divorced from the circumstances existing at the time it was passed. U.S. v. Champlin Refining Company, 341 U.S., 290, 297 (1951). The 1984 disregard was attached to the new sibling deeming provision, and was included in the legislative history under the heading of "Parents and Siblings of Dependent Children Included in Filing Units." The only logical explanation for its inclusion in the 1984 amendment was to minimize the impact of considering the child support of independently supported children who under the new deeming provision were forced into the AFDC filing unit. In fact, that is precisely the conclusion reached by this Court in Gilliard:

> The burden of the [filing unit] change was mitigated somewhat by a separate amendment providing that the first fifty dollars of child support collected by the State must be remitted to the family and not counted as income for the purpose of determining its benefit level.

107 S. Ct. at 3013. This Court viewed the $50 disregard adopted in 1984 as being tied to the sibling deeming

provision. It had nothing to do with "incentives" to cooperate.

The financial hardship acknowledged in Gilliard will be no less for children supported through Social Security benefits than for those supported by child support in other forms. The plain language of the disregard statute entitles these children to the same mitigation of that hardship.

C. THE SECRETARY'S INTERPRETATIONS OF THE DISREGARD STATUTE ARE ARBITRARY, CONTRADICTORY AND IRRATIONAL AND ARE NOT ENTITLED TO DEFERENCE.

The general principle of deference to an agency's interpretation of the statute it is charged with administering should not obscure the quintessentially judicial function of determining what the statute means and what Congress intended. Chevron U.S.A. Inc. v. National Resources Defense Council, 467 U.S. 837, 843 n.9 (1984). As this Court has noted:

> ... the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." American Shipbuilding Co. v. NLRB, 380 U.S. 300, 318, 13 L.Ed. 2d 855, 85 S.Ct. 955 (1965). Accordingly, while reviewing Courts should uphold reasonable and defensible constructions of an agency's enabling Act ... they must not "rubber stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrates the congressional policy underlying the statute." NLRB v. Brown, 380 U.S. 278, 291-292. 13 L.Ed. 2d 838, 85 S.Ct. 980 (1965).

Bureau of Alcohol, Tobacco and Firearms v. FRLA, 464 U.S. 89, 97 (1983).

The Secretary has applied his own definition of "child support" so erratically that his interpretation of the disregard provision is entitled to no deference from this Court. Id.; Adamo Wrecking Co. v. U.S., 434 U.S. 275, 287 n.5 (1978). For example, while insisting that "any child support"

be construed as narrowly as possible, he has responded to inquiries from two IV-D state agencies as to whether the $50 disregard should only be applied to court-ordered support this way:

> The $50 disregard applies to any support which has been assigned to the state pursuant to Section 402(a)(26) of the Act and is distributed under Section 457(b) of the Act, including voluntary support.

53 Fed. Reg. 21644 (1988). Expanding the definition beyond court-ordered support to voluntary support is hardly consistent with a narrow reading of the statute. If voluntary payments can be subject to the disregard, then why could not Title II payments received by an AFDC family in the absence of a support order be considered voluntary direct payments and be subject to the disregard when reported to the IV-A agency?

The Secretary went on to answer a state agency's question of whether spousal support is subject to the disregard this way:

> The $50 disregard payment applies to both child and spousal support. This conforms to Section 12 of Public Law 98-378 which requires state IV-D agencies to collect spousal support if a support obligation has been established with respect to the spouse and the IV-D agency is enforcing the child support order.

Id. at 21642 (June 9, 1988). This constitutes an incredibly broad view of what is child support. The Secretary in his answer seems to be more concerned with how a payment is collected than with the nature of the payment itself. Spousal support, of course, is not even designated as being for the child and benefits the child only indirectly. Yet, the Secretary insists that a Title II payment specifically earmarked for the child cannot be subject to the disregard without "stretching" the term child support beyond its generally accepted meaning! This interpretation is arbitrary, irrational and patently wrong.

D. THE DECISIONS OF ONE FEDERAL APPELLATE COURT AND ONE INTERMEDIATE STATE APPELLATE COURT WHICH ARE NOT CONSISTENT WITH THE FOURTH CIRCUIT DECISION AND ARE CLEARLY CONTRARY TO THE DEVELOPING CASE LAW DO NOT JUSTIFY GRANTING A WRIT.

Only two courts have held that Title II children's benefits are not entitled to the $50 disregard. Todd v. Norman, supra; Baylor v. New Jersey Dept. of Human Services, 235 N.J. Super. 22, 561 A.2d 618 (1989). These decisions do not create the kind of conflict which justifies this Court's review; the latter is based on an interpretation of New Jersey welfare statutes, while the former relies on a patently flawed analysis that has been rejected by every other court that has considered the issue.[3]

The Eighth Circuit in Todd relied in large part on the legislative history of the 1974 disregard which was shown to be inapplicable to the present provision, supra. That court also maintained that the disregard could not be applied because Title II benefits are not assignable. The syllogism the court constructed was as follows: AFDC recipients must assign their support rights to the state; the anti-alienation provision, 42 U.S.C. Section 407(a), provides that Title II benefits are not assignable; therefore, "child support payments" cannot be read to include Title II.

The analysis fails to take into account that child support monies can be received by the family directly as well as collected and dispensed by the state IV-D agency, see 45 C.F.R. Section 303.80. States have the option of either collecting these direct payments from the recipients (the "IV-D" option)

[3]Brown v. McMahon, supra; Jackson by Forrest v. Mullany, 708 F. Supp. 483 (N.D. N.Y. 1989); D'Antignac v. Perales, No. 16444-86 (N.Y. S.Ct. App. Div. May 9, 1988); McBee v. Sallee, No. 2-86-103 (E.D. Tenn. Nov. 26, 1986); Davis v. Sallee, No. 4-86-27 (E.D. Tenn. Oct. 10, 1986); accord Ledbetter v. Foster, 180 Ga. App. 696, 350 S.E. 2d 31 (1986).

or not collecting them but treating them as income in calculating the AFDC grant (the "IV-A" option). Id. at Sections 233.20(a)(3)(v)(B), 302.31(a)(3) and 303.80. In the preamble to regulations implementing the 1984 disregard, the Secretary noted that 45 C.F.R. Section 233.20(a)(4)(ii)(j) was being revised to clarify that in States using the "IV-A option, the fifty dollar disregard is to be applied in determining eligibility and grant amount." 45 Fed. Reg. 35,590 (1984). A year later, in the preamble to certain amendments to the "IV-A option" and "IV-D option" regulations made in light of the DEFRA disregard, HHS clearly stated that whether the money is budgeted as income under IV-A or recouped from the recipients under IV-D, "the individual who retains a direct payment is entitled to the first fifty dollars of the monthly support obligation." 50 Fed. Reg. 34,693 (1985). Child support payments therefore need not be "assignable" to come under the disregard provision. The analysis of the Todd court is simply wrong.

The New Jersey Superior Court in Baylor conceded that a state might apply the disregard to dependents' benefits if it chose to view them as child support. However, the court held that New Jersey does not do so either by statute or by its state plan and is not required to do so by the federal disregard statute. The reasoning of Baylor was idiosyncratic and should not have influence beyond its home state.

Every other court that has considered the matter has ruled consistent with the Fourth Circuit. The Eastern District of California has most recently taken up the issue, and in the McMahon decision, issued on October 11, 1989, has undertaken the most comprehensive analysis to date. That opinion is set forth in Respondents' Appendix beginning at 2a. It

demonstrates that the trend of the decisions is running strongly in the direction of applying the disregard to any child support, including Title II.

E. THE NEGLIGIBLE IMPACT THIS CASE WILL HAVE UPON THE COST AND ADMINISTRATION OF THE AFDC PROGRAM DOES NOT JUSTIFY THE GRANTING OF A WRIT.

Counting both state and federal dollars, the total actual benefit expenditure for the AFDC program during the 1986 fiscal year was just under $15.8 billion ($15,797,000,000). "Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means," Ways and Means Committee Pamph. 101-4, March 15, 1989, p. 556. The total number of families that received AFDC in 1986 has been estimated to be approximately 3.7 million. Id.

The Secretary estimates that in 1986, 73,000 AFDC families received Social Security benefits, and while he has no statistics differentiating the Title II children's benefits received from other forms of Social Security, he estimates that virtually all the families in this category were in fact receiving Title II. Petition at 18, n.17. Figuring that a $50 per month disregard would amount to $600 per year for each such family, he estimates the cost of the disregard for 73,000 families at $600 per year would be $43.8 million annually.

Accepting these figures and extrapolations as accurate, only an additional two per cent of the total number of AFDC families in 1986 would have qualified for the disregard if the Fourth Circuit's decision had been the law of the land at the time. The additional annual cost would have represented only 0.27 per cent of the program's benefit budget.

The Fourth Circuit thus affects an insignificant portion of

the AFDC program. The importance of the federal question involved is not such as to justify the granting of a writ.

CONCLUSION

Petitioner has raised no issues which would justify the granting of a Writ of Certiorari under Rule 17 of the Rules of this Court. This case involves an exceedingly minor issue of statutory interpretation affecting less than 2% of all AFDC families. It will have a negligible fiscal or administrative impact on the AFDC program. The one federal appellate court decision inconsistent with the Fourth Circuit is based on a patently flawed analysis and is clearly contrary to the strongly developing trend of the law. The Secretary's interpretation of the statute at issue is irrational in that it is inconsistent with his own regulatory scheme and contrary to the plain language of the section and is therefore entitled to no deference.

For these reasons, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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AFFIDAVIT OF FILING AND SERVICE

STATE OF VIRGINIA
COUNTY OF CULPEPER, to-wit:

Jamie B. Aliperti, being first duly sworn, deposes and says:

1. I am counsel of record in this case for the Respondents, Elizabeth Stroop, et al., and a member of the Bar of this Court.

2. On November 1, 1989, pursuant to Supreme Court Rules 28.2 and 46.2, and within the time permitted for filing, I caused to be mailed, first class, postage prepaid, at the United States Post Office, Culpeper, Virginia 22701, addressed to The Honorable Joseph F. Spaniol, Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543, the original of (a) the attached Brief in Opposition to Petition for Writ of Certiorari, and (b) Motion for Leave to Proceed in Forma Pauperis, with accompanying affidavits.

3. On November 1, 1989, pursuant to Supreme Court Rule 28.5, I also caused to be mailed, first class, postage prepaid, at the same Post Office, a copy of (a) the attached Brief in Opposition for Writ of Certiorari, and (b) Motion for Leave to Proceed in Forma Pauperis with accompanying affidavits, to each of the following persons:

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I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 1st day of November, 1989, at Culpeper, Virginia.

Jamie B. Aliperti

Jamie B. Aliperti

The foregoing instrument was subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid, on this 1st day of November, 1989, by Jamie B. Aliperti.

Notary Public

My commission expires: January 4, 1991.

RESPONDENTS' APPENDIX

U.S. Constitution, Fifth Amendment 1a

Brown v. McMahon, No. CIV.S-87-1581 (E.D. Cal. October 11, 1989) 2a

UNITED STATES CONSTITUTION

AMENDMENT V[1791].

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHERYL BROWN; JEANETTE HAMILTON, proceeding by and through her guardian ad litem, MARTHA LIEBISCH, individually, and on behalf of all similarly situated persons, Plaintiffs, v. LINDA McMAHON, Director, California Department of Social Services, Defendant and Third-Party Plaintiff, v. OTIS R. BOWEN, M.D., Secretary U.S. Department of Health and Human Services, Third-Party Defendant.	NO. CIV.S-87-1581 RAR MEMORANDUM OPINION

PROCEDURAL AND FACTUAL BACKGROUND

On November 9, 1987, plaintiffs, recipients of Aid to Families with Dependent Children (hereinafter "AFDC"), had cause to file the above-entitled action as a class action for declaratory and injunctive relief. In essence, the complaint challenges the California Department of Social Services policy with regard to its calculation of AFDC benefit levels. See 42 U.S.C. § 601-676 (1982 & Supp. V 1987). Specifically, the action raises the issue of whether under the Federal Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 494 (1984), tit. 2, social security benefits to children of disabled wage earners should be considered "child support" for purposes of applying the fifty dollar ($50.00) "disregard" provision, codified at 42 U.S.C. § 602(a)(8)(A)(vi).

The procedural history of this action is as follows: after the filing of the original complaint, defendant Linda McMahon, Director of the California Department of Social Services, filed a third-party complaint against Otis R. Bowen, M.D., then Secretary of the United States Department of Health and Human Services. A stipulation and order granting class certification was filed July 22, 1988. Thereafter, on July 29, 1988, plaintiffs filed a motion for summary judgment. On August 15, 1988, third-party defendant filed a cross-motion for summary judgment. Pursuant to those motions, the parties presented oral arguments to the court after which the case was taken under submission.

I

Overview of the AFDC Program

The AFDC program was established by Congress to provide aid to children who are needy because of a parent's death, absence or incapacity. 42 U.S.C. § 606(a). Participation by the states in the AFDC program is optional, but if a state elects to participate it must abide by federal law in the administration of its AFDC program. See Bowen v. Gilliard, 483 U.S. 587, 589 n. 1, 107 S.Ct. 3008, 3011 n. 1, 97 L.Ed.2d 485 (1987); Townsend v. Swank, 404 U.S. 282, 290-291, 92 S.Ct. 502, 507-08, 30 L.Ed.2d 448 (1971). The amount of assistance provided to families with dependent children, (otherwise known as "family units" or "assistance units"), is determined through a state standard of need. In this regard, federal law requires that participating states consider all income and resources available to the needy family unit before making the need determination. 42 U.S.C. § 602(a)(7). Thus, as a general rule, any income received by a family unit seeking AFDC benefits is taken into account and such income reduces dollar for dollar a family unit's benefit level. However, as described more fully infra, under the current law, portions of certain types of income are "disregarded" or not counted as family income when the state is making its need determination. 42 U.S.C. § 602(a)(8)(A).

Once the state makes its need determination, a benefit award is calculated and AFDC payments are made to the family

unit. In order to obtain benefit awards, AFDC applicants are required, inter alia, to assign to the state (1) all rights they have to collect child support payments and (2) all rights to other support payments from any other person including non-custodial parents. 42 U.S.C. § 602(a)(26)(A). The state then collects the child support payments from the non-custodial parent or other person obligated to support the AFDC applicant. See 42 U.S.C. § 651.

The Deficit Reduction Act of 1984 added three provisions to the AFDC program which affect the instant litigation. First, a "mandatory filing unit" provision requires that the income of all members of the assistance unit be included in calculating the total income of the assistance unit. 42 U.S.C. § 602(a)(38). Prior to the Deficit Reduction Act families seeking AFDC benefits could exclude from the assistance unit a family member receiving income (such as child support or social security benefits) whose income would reduce the total amount of the assistance unit's AFDC benefit award. The mandatory family unit requirement put an end to the practice of excluding family members with income in order to maximize family benefits and ensure that the income of all family members who live together and share expenses is recognized and counted as available to the family unit as a whole.

Secondly, the Deficit Reduction Act's "pass through" provision requires the state to pass through to the assistance unit the first $50.00 of support collected each month from non-

custodial parents (or other persons obligated to support the AFDC applicant) without decreasing the amount of the assistance unit's AFDC benefit award. 42 U.S.C. § 657(b)(1). The pass through provision provides in relevant part:

> The amounts collected as support by a State . . . shall . . . be distributed as follows:
> (1) the first $50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month.

42 U.S.C. § 657(b)(1).

Finally the Deficit Reduction Act's "child support disregard" provision, specifically at issue in the instant action, provides that in making the need determination for an assistance unit, the state:

> shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title);...

42 U.S.C. § 602(a)(8)(A)(vi) (emphasis added).

The parenthetical reference to the "pass through" provision of 42 U.S.C. § 657(b) makes it clear that the words "any child support payments" are to include that child support collected by the state each month from non-custodial parents or

other persons obligated to support the AFDC applicant and passed through or paid to the assistance unit pursuant to § 657(b), as well as other types of child support. Thus, the legal issue before the court is whether those "other types" of child support payments include support payments received by a child in the form of social security child's insurance benefits under title II of the Social Security Act.[1]

Pursuant to title II of the Social Security Act, social security child's insurance benefits are paid to children whose parents are disabled, aged, or deceased wage earners. 42 U.S.C. § 402(d) (1982 & Supp. V 1987). Child's insurance benefits are attributable to the work effort of parent and are used exclusively for the support and maintenance of that parent-'s child or children. The AFDC program mandates that states treat a child's social security insurance benefits as income or resources of a member of the assistance unit when making the

[1] Although this issue is one of first impression in this circuit, courts in other circuits have come to opposite conclusions. A number of courts have held that the term "any child support payments" as used in 42 U.S.C. § 602(a)(8)(A)(vi) includes a child's title II social security insurance benefits. E.g., Carter v. Bowen, No. 86-0398-R (E.D. Va. March 4, 1988), aff'd sub nom., Stroop v. Bowen, 870 F.2d 969 (4th Cir. 1989) reh'g denied, May 31, 1989; Jackson by Forrest v. Mullany, 708 F. Supp. 483 (N.D. N.Y. 1989); Davis v. Sallee, No. 4-86-27 (E.D. Tenn. Oct. 10, 1986); McBee v. Sallee, No. 2-86-103 (E.D. Tenn. Nov. 26, 1986); D'Antignac v. Peralta, No. 16444-86 (N.Y. S.Ct. App. Div. May 9, 1988). By contrast, the Eighth Circuit has concluded that a child's title II social security insurance benefits are not "child support" within the meaning of § 602(a)(8)(A)(vi). Todd v. Reagan, No. 85-300-A (S.D. Iowa Dec. 22, 1986), aff'd sub nom., Todd v. Norman, 840 F.2d 608 (8th Cir. 1988), reh'g en banc denied, May 20, 1988; Accord Baylos v. New Jersey Dep't of Human Servs., 235 N.J. Super. 22, 561 A.2d 618 (1989).

need determination for AFDC purposes. 42 U.S.C. § 602(a)(7)(A). However, assignment to the state or other transfer of social security benefits paid under title II is expressly prohibited. 42 U.S.C. § 407(a) (Supp. V 1987).

The Secretary has never specifically defined the terms "child support payments" within the meaning of the child support disregard provision, § 602(a)(8)(A)(vi). However, the regulations implementing the provisions of the DEFRA, published on September 10, 1984, 49 Fed. Reg. 35,586, 35,604 (see 45 C.F.R. §§ 232.20(a), 302.51(b)(1) (1988)), lend support to the Secretary's present litigation posture that § 602(a)(8)(A)(vi) mandates a $50.00 disregard only in circumstances where child support payments have been assigned to the state and are considered "collected" by the state under § 657(b).[2]

[2] The summary of the interim final regulations implementing changes in the AFDC program mandated by the DEFRA provides, inter alia, that the DEFRA:

> Requires States to disregard the first $50 per month of the current monthly support obligation of any child support collected on the family's behalf or received directly by the family in determining AFDC eligibility and payment amounts.

49 Fed. Reg. 35,586 (1984)(emphasis added). Specifically, the interim final regulations, 49 Fed. Reg. 35,599 (1984), amended 45 C.F.R. § 232.20(a) to provide as follows:

> § 232.20 Treatment of child support collections made in the Child Support Enforcement Program as income and resources in the Title IV-A Program.
> (a) Definition. For purposes of this section, notwithstanding any other regulations in this chapter, support collections, monthly

The State of California, in accordance with these federal regulations and the Secretary's interpretation of § 602(a)(8)(A)(vi), does not consider social security child's insurance benefits to be "child support payments" within the meaning of the child support disregard provision. Consequently, the state does not disregard the first $50.00 of child support

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> collections and support amounts for a month mean the assigned amount that the support enforcement agency collects from an absent parent or spouse on a monthly support obligation, less the disregarded sum under § 302.51(b)(1).

45 C.F.R. § 232.20(a) (1988)(emphasis added). The interim final regulations, 49 Fed. Reg. 35,604-05 (1984) also amended 45 C.F.R. § 302.51(b)(1) (1988) to implement DEFRA's pass through provision, 42 U.S.C. § 657(b)(1). The amended regulation provides in relevant part:

> § 302.51 Distribution of support collections.
>
> The State plan shall provide as follows:
>
> (b) The amounts collected as support by the IV-D agency pursuant to the State plan for children and the parents of such children who are current recipients of aid under the State's title VI-A plan and for whom an assignment under 232.11 of this title is effective shall be distributed as follows:
>
> (1) Of any amount that is collected in a month which represents payment of the required support obligation for that month, the first $50 of such amount shall be paid to the family. This payment may not be used in determining the amount paid, if any, to the family in paragraph (b)(3) of this section.

45 C.F.R. § 302.51(b)(1) (1988)(emphasis added).

payments in making the need determination for an assistance unit when the source of the support payments are title II social security child's insurance benefits.

As previously indicated, plaintiffs bring this action to challenge the Secretary's interpretation of § 602(a)(8)(A)(vi), the child support disregard provision. Plaintiffs contend that the words "any child support payments" include support payments received by a child in the form of child's insurance benefits pursuant to title II of the Social Security Act.

DISCUSSION

II

The Statutory Language

In interpreting the meaning of the DEFRA's child support disregard provision, 42 U.S.C. § 602 (a)(8)(A)(vi), the court first attempts to determine congressional intent, employing traditional tools of statutory construction. N.L.R.B. v. United Food & Com'l Wkrs. Union, 484 U.S. 112, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987); see also I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). If congressional intent can be determined, that intention is the law and the Secretary's regulations implementing the provision at issue must be fully consistent with and give effect to the legislative will. Id.; see Fernandez v. Brock, 840 F.2d 622, 631 (9th Cir. 1988). If however, upon review of the statute's language, structure and legislative history, Congress' intent

cannot be determined, courts will defer to the administrative agency's interpretation so long as the interpretation is rational and consistent with the statute. N.L.R.B. v. United Food & Com'l Wkrs. Union, 484 U.S. 112, 108 S.Ct. at 421; Smith v. Heckler, 820 F.2d 1093, 1094 (9th Cir. 1987). See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984).

The starting point in determining Congress' intent is the plain meaning of the language of the statute itself. See Fleming v. Dept. of Public Safety, 837 F.2d 401, 405-406 (9th Cir. 1988), cert. denied, __ U.S. __, 109 S.Ct. 222, 102 L.Ed.2d 212 (1988). If the statutory language is unambiguous, that language is regarded as conclusive absent a clearly expressed legislative intention to the contrary. See I.N.S. v. Cardoza-Fonseca, 480 U.S. at 432 n. 12, 107 S.Ct. at 1213 n. 12.

The language at issue here are the words "any child support payments . . . (including support payments collected and paid to the family under section 657(b) of this title)." 42 U.S.C. § 602(a)(8)(A)(vi). Unfortunately, Congress has failed to explicitly define the term "child support payments" within the meaning of the child support disregard provision, § 602(a)(8)(A)(vi).[3] The Secretary contends that the $50.00 dis-

[3] Plaintiffs urge the court to apply California law to determine what constitutes "child support". However, both parties agree that the term "child support" is defined in a variety of ways in the various states. Thus, utilizing state law to define the term "child support" would give the Social

regard applies only to those "child support payments" assigned to and collected by the state and paid to the family under § 657(b). However, a perusal of the statutory language reveals that the Secretary's interpretation of § 602(a)(8)(A)(vi) is patently inconsistent with the intent of Congress as reflected in the plain meaning of the statute's language.

First, the plain language of § 602(a)(8)(A)(vi) mandating that states disregard the first $50.00 of "any child support payments" does not distinguish between classes of child support payments that trigger the disregard. See Turner v. McMahon, 830 F.2d 1003, 1007 (9th Cir. 1987). In construing statutes, courts must give effect to the subtleties of language that Congress chose to employ, particularly where Congress has isolated sections for special consideration by way of amendment. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174 (1986). Further, well established edicts of statutory construction require that courts reject interpretations that fail to give effect to all of the words used by Congress. E.g., Central Montana Electric Power

Security Act a varied and possibly inconsistent meaning nationwide. When construing a federal statute, the courts must strive for an interpretation that will result in consistent application nationwide. Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 119-120, 103 S.Ct. 986, 995-96, 74 L. Ed. 2d 845 (1983), reh'g denied, 461 U.S. 911 (1983). Further, courts assume that in the absence of plain indications to the contrary, when Congress enacts a statute, it does not intend to make its application dependent upon state law. 460 U.S. at 119, 103 S.Ct. at 995. Thus, the court declines to apply state law to determine the meaning of the words "any child support payments" under 42 U.S.C. § 602(a)(8)(A)(vi). Accord Todd v. Norman, 840 F.2d 608, 611 (8th Cir. 1988).

Co-op., v. Adm'r of Bonneville Power, 840 F.2d 1472, 1478 (9th Cir. 1988). Thus, the word "any" when referring to "child support payments" in § 602(a)(8)(A)(vi) significantly broadens the scope of the statute and indicates the congressional intent to include all forms of child support received by the AFDC family for the use and benefit of the dependent child.

Furthermore, contrary to the Secretary's position, the language of the statute clearly indicates that the $50.00 disregard is not limited to support payments collected and paid to the family under § 657(b), but includes other types of support payments as well. The language of the child support disregard provision mandates that states "shall disregard the first $50 of any child support payments . . . (including support payments collected and paid to the family under section 657(b) of this title)." 42 U.S.C. § 602(a)(8)(A)(vi) (emphasis added). The ordinary meaning of the parenthetical language of § 602(a)(8)(A)(vi) makes it obvious that the words "any child support payments" are to include not only support payments collected and paid to the family under § 657(b), but other types of child support as well. The ordinary and obvious meaning of a phrase is not to be lightly discounted and courts must assume that the legislative purpose is expressed by the ordinary meaning of the words used. I.N.S. v. Cardoza-Fonseca, 480 U.S. at 431, 107 S.Ct. at 1213.

Ignoring the parenthetical language, the Secretary contends that the $50.00 disregard applies only to those support

payments assigned to and collected by the state and paid to the family under § 657(b).[4] Explaining this interpretation, the Secretary merely states that the child support disregard provision, § 602(a)(8)(A)(vi), and the pass through provision, § 657(b), are co-extensive statutes which are "inextricably intertwined". In essence, the Secretary views the provisions as two sides of the same coin: the "pass through" of a $50.00 support payment collected and paid to the AFDC family under § 657(b) being the only circumstance permitting a "disregard". The Secretary's contention that the two statutes are merely co-extensive is belied by the plain meaning of the parenthetical

[4] The Eighth Circuit in Todd v. Norman, 840 F.2d 608 (8th Cir. 1988) facing the same issue, agreed with the Secretary's position that only those child support payments assigned to and collected by the state trigger the $50.00 child support disregard provision. In attempting to explain the parenthetical language of 42 U.S.C. § 602(A)(8)(a)(vi), the Todd court points to 45 C.F.R. §§ 233.20(a)(3)(v), 302.31(a)(3) and 303.80 (1988). These regulations guide the states in their treatment of child support payments which are made directly to the family unit despite assignment to the state, or are made before the assignment becomes effective. The regulations establish alternate procedures whereby the state can collect child support paid directly to the family unit. The Todd court reasoned that because these regulations "show that the state can collect child support payments outside of 42 U.S.C. § 657(b), [they] thus provide a ready explanation for the parenthetical language" in 42 U.S.C. § 602(a)(8)(A)(vi). Todd, 840 F.2d at 613.

However, the Todd court fails to explain why it considers such direct payment collections to be "outside" of 42 U.S.C. § 657(b). Section 657(b) merely refers to the amounts "collected as support by a State pursuant to a plan approved under this part . . . ." Thus, these regulations may not provide a ready explanation for the parenthetical language, as the Todd court suggests. Moreover, even assuming such collections are considered to be "outside" of section 657(b), the improbability that Congress envisioned these two highly specific regulations to be the "other types of child support outside of 42 U.S.C. § 657(b)" makes the argument untenable.

language in § 602(a)(8)(A)(vi). Section 602(a)(8)(A)(vi) is obviously broader than § 657(b) as it "includes" support payments collected by the state and paid to the family unit under § 657(b), and is therefore not limited to those support payments. Because the Secretary's narrow reading of § 602(a)(8)(A)(vi) and § 657(b) is patently inconsistent with a plain reading of the statute's language, judicial deference to that interpretation is unwarranted. See I.N.S. v. Cardoza-Fonseca, 480 U.S. at 432 n.12, 446-48, 107 S.Ct. at 1213 (no deference to agency's interpretation because plain statutory language settles the question); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. at 842-843, 104 S.Ct. at 2781-82 (no deference to administrative interpretations manifestly contrary to the statute); Smith v. Heckler, 820 F.2d at 1094 (court will not rubber stamp agency's construction of a statute inconsistent with statutory mandate).

Notwithstanding the statutory language to the contrary, the Secretary argues that his reading of the term "any child support payments" to include only support payments collected and paid to the AFDC family under § 657(b) must withstand plaintiffs' challenge because it is consistent with and harmonizes related sections of the Social Security Act. Those sections mandate on the one hand that all "child support payments" be assigned to the state, 42 U.S.C. § 602(a)(26)(A), and on the other hand that a child's insurance benefits cannot be

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assigned to a third party, such as the state, 42 U.S.C. § 407(a).

The Secretary's argument in this regard is only forceful if one assumes that the term "child support" has the same meaning each time the term appears in the Social Security Act. The term "child support", however, has different meanings within different provisions of the Social Security Act's complex statutory scheme. For example, 42 U.S.C. § 662(b) explicitly provides a definition of the term "child support" which, inter alia, makes the term "subject to and in accordance with State law". Since the Secretary is unwilling to accept this definition of the term "child support" throughout the Social Security Act, he must concede that the term "child support" has different meanings within different sections of the Act. The Ninth Circuit has long recognized that a term used in different sections of a complex statute does not necessarily carry the same meaning in each context. See e.g., Kennecott Copper Corp. v. Train, 526 F.2d 1149, 1154 n. 20 (9th Cir. 1975), cert. denied, 425 U.S. 935 (1976); U.S. v. Stauffer Chemical Co., 684 F.2d 1174, 1185 (6th Cir. 1982), aff'd, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984).

The above examination of the statutory language thus leads inexorably to the conclusion that, contrary to the Secretary's construction, Congress intended the child support disregard provision, § 602(a)(8)(A)(vi), to apply not only to support payments collected and paid to the family unit under

§657(b) but other types of child support as well. Unfortunately, the statutory language stops short of revealing whether Congress intended these "other types" of child support to include support payments received by a child in the form of a child's title II social security insurance benefits.

III

Legislative History of the
Child Support Disregard Provision

Since the language of § 602(a)(8)(A)(vi) leaves open the question of what types of "child support payments" (other than support payments collected by the state and paid to the family under § 657(b)) are to be included in the operation of the DEFRA's child support disregard provision, the court turns to the statute's legislative history to glean the underlying congressional intent. Unfortunately, the statutory language at issue in the present action was added during the final conference negotiations concerning the DEFRA and there is no legislative history detailing precisely what Congress intended by the language finally adopted.

Notwithstanding the lack of explicit legislative history on point, the parties look to the legislative context surrounding the enactment of the DEFRA's child support disregard provision and the legislative history of a related statute passed by Congress in 1974 as evidence of the congressional intent underlying § 602(a)(8)(A)(vi).

The Secretary argues that the legislative history of a 1974 "pass through" provision, 42 U.S.C. § 657(a)(1) (1974), (predecessor to the DEFRA's current pass through provision, 42 U.S.C. § 657(b)(4)), is relevant to discerning Congress' intent in passing the DEFRA's child support disregard provision, 42 U.S.C. § 602(a)(8)(A)(vi).[5] Specifically, the Secretary contends that Congress had the same purpose in enacting the DEFRA's child support disregard provision as it had in passing the 1974 pass through provision, i.e., to provide an incentive for families receiving AFDC benefits to collect child support payments from non-custodial working parents. Thus, the Secretary seeks to employ the legislative history underlying the 1974 pass through provision to explain Congress' intent in passing the 1984 DEFRA's child support disregard provision.

This transfer of congressional intent provides the sole support for the Secretary's position that DEFRA's child

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[5] The purpose of the 1974 "pass through" was to provide a greater financial incentive to AFDC recipients to cooperate in the collection of child support payments from the child's non-custodial parent. See S. Rep. No. 1356, 93rd Cong., 2d Sess. 23, reprinted in 1974 U.S. Code Cong. & Admin. News 8133, 8155. In furtherance of this goal, Congress enacted the earlier pass through provision which provided that 40% of the first $50.00 collected on the monthly support obligation of non-custodial parents would be passed through to the family without affecting their AFDC eligibility. 42 U.S.C. § 647(a)(1) (1974). AFDC family units were thus encouraged to cooperate with the state in collecting child support from an absent working parent because for each month that such support was actually collected the AFDC family received income in addition to their AFDC benefit award. The 1984 DEFRA's pass through provision is quite similar in that it provides that the first $50.00 collected on the monthly support obligation of non-custodial working parents shall be passed through to the AFDC family without affecting their AFDC eligibility. 42 U.S.C. § 657(b)(1).

support disregard applies only to families where the absent parent is able to work and thus make child support payments directly, and not to families where the absent parent is unable to work and the child support payments are made indirectly through a child's social security insurance benefits. The rationale for the Secretary's distinction is that families who receive child support from the absent parent indirectly, in the form of a child's social security insurance, need no incentive to collect support payments from the absent parent, as those payments are made directly by the government.

Plaintiffs, on the other hand, contend that the 1984 Congress was not concerned with creating incentives for collecting child support. Rather, Congress' purpose in enacting the DEFRA's child support disregard provision was to mitigate the harsh effects of the DEFRA's mandatory filing unit provision. Under this view, the Secretary's distinction between families that receive support payments directly from an absent working parent and families that receive support payments indirectly, from an absent parent who is unable to work via child's social security insurance benefits, is wholly insupportable. Both families are equally subject to the harsh effects of the DEFRA's mandatory filing unit provision and should be equally entitled to the benefits of the $50.00 child support disregard.

Upon careful consideration of the well-drafted arguments by both counsel, the court is unpersuaded that Congress' intent in passing the 1974 pass through provision should be

"transferred" to the 1984 passing of DEFRA's child support disregard provision. The legislative context in which the current disregard provision was passed and the available case law lead inescapably to the conclusion that Congress' purpose in passing the child support disregard provision was not, as the Secretary suggests, to provide incentives for collecting child support from non-custodial working parents. Rather, for the following reasons, the court concludes that Congress intended the DEFRA's child support disregard provision to mitigate the burden that the Act's mandatory filing unit provision was to have on AFDC families.

The court is unpersuaded that a transfer of congressional intent is warranted for several reasons. First, it is improper to infer the intent of the 1984 Congress from the views of an earlier Congress. It is the intent of the Congress which enacted the legislation that controls. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758, 99 S.Ct. 2066, 2072, 60 L.Ed.2d 609 (1979); see also United States v. Price, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960); Conference of State Bank Supervisors v. Conover, 710 F.2d 878, 884 (D.C. Cir. 1983).

Second, even assuming congressional intent could properly be transferred from one Congress to another, the DEFRA's child support disregard provision has no correlate in the 1974 legislation. Although the current language of 42 U.S.C. § 657(b), the DEFRA's pass through provision, and the prior language of 42 U.S.C. § 657(a)(1) (1974) each provide for

a "pass through", the issue before this court is not the meaning of the pass through provision, but rather, the meaning of the child support disregard provision. In arguing that Congress' intent underlying the 1974 pass through should be used to explain the DEFRA's child support disregard, the Secretary mistakenly assumes that the DEFRA's pass through provision and the DEFRA's child support disregard provision are one and the same. The court has previously rejected the Secretary's argument that these two provision are merely opposite sides of the same coin. Rather, the court reads these two separate provisions exactly as Congress wrote them: two separate and distinct statutory provisions, the disregard provision being broader in scope as it includes payments made pursuant to the pass through provision.

Third, a review of the Social Security Act's history reveals that in 1974 Congress' purpose in amending that Act was probably not the same as in 1984 when Congress passed the DEFRA amendments. When Congress enacted the 1974 amendments, the legal landscape to be amended was quite different in that the Social Security Act's statutory scheme at that time contained no incentives to ensure that child support payments were collected from non-custodial parents. The 1974 amendments created at least two means of improving parental support of AFDC family units: the earlier pass through provision, 42 U.S.C. § 647(a)(1) (1974), and mandatory assignment and cooperation provisions which required all AFDC recipients to assign to the state any

support rights they had in their own behalf or on behalf of their dependents who were AFDC recipients. Social Services Amendments of 1974, Pub. L. No. 93-647, §§ 101(a)-(c), 88 Stat. 2337 (1974), reprinted in 1974 U.S. Code Cong. and Admin. News 2716, 2732-44. By the end of 1975, the pass through provision was phased out, and the mandatory assignment and cooperation provisions remained. Thus, unlike the statutory scheme to be amended in 1974, when Congress enacted the DEFRA amendments in 1984 the Social Security Act included assignment and cooperation requirements which had been in place for a decade to ensure that child support payments were collected.

Finally, evidence supporting the view that in passing the 1984 DEFRA's child support disregard provision Congress was not concerned with creating incentives for collecting child support is found by viewing DEFRA in the context of other legislation pending before Congress at the time. One month after enacting the DEFRA, Congress passed a separate statute which addressed a whole range of issues regarding child support enforcement. See The Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 2397-78. The proposition that Congress inserted a child support "incentive" provision in the DEFRA, a bill with no other child support enforcement issues, while at the same time considering a comprehensive revision of the child support enforcement structure is simply unreasonable.

For all these reasons, the court rejects the Secretary's argument that Congress' intent in 1974, focused as it was on creating incentives for absent parents to make child support payments, should be transferred to the Congress that enacted the 1984 DEFRA's child support disregard provision. The Secretary's assumption that in passing the child support disregard provision in 1984, Congress had the same intent it had in passing the 1974 pass through provision is wholly without support.

By contrast, there is forceful evidence in the context in which the DEFRA's child support disregard provision was enacted to support the view that Congress intended the disregard provision to mitigate the effects that the Act's mandatory filing unit provision was to have on AFDC recipients. The child support disregard provision emerged from the Conference Committee that developed the final version of the Deficit Reduction Act of 1984. Neither the Senate nor the House bill contained any disregard provision. The Senate's proposed version of the DEFRA contained a mandatory filing unit provision which, as discussed supra, required previously excluded children to be counted as members of the assistance unit. The House bill did not contain a mandatory filing unit provision. In conference, the House acceded to the Senate's version of the DEFRA, but the section that authorized the mandatory filing unit was expanded to provide for the child support disregard provision and the pass through provision. See H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S. Code Cong. &

Admin. News 2095. Thus, the context in which the child support disregard provision was enacted strongly suggests that Congress' purpose in passing that provision was to mitigate the harsh effects that the mandatory filing unit provision was to have on AFDC recipients.

The view that Congress intended § 602(a)(8)(A)(vi) to mitigate the effects of the mandatory filing unit provision is also supported by the Supreme Court in Bowen v. Gilliard, 483 U.S. 587, 107 S.Ct. 3008, 97 L.Ed.2d 485 (1987) wherein the Court made an explicit pronouncement regarding the purpose of the child support disregard provision. In upholding the constitutionality of the DEFRA's mandatory filing unit provision, the Supreme Court stated:

> Because the 1984 amendments forced families to include in the filing unit children for whom support payments were being received, the practical effect was that many families' total income was reduced. The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the state must be remitted to the family and not counted as income for the purpose of determining its benefit level. See 42 U.S.C. § 602(a)(8)(A)(vi) (1982 ed., Supp. III); 42 U.S.C. § 657(b)(1) (1982 ed., Supp. III).

Bowen v. Gilliard, 483 U.S. at 594, 107 S.Ct. at 3013 (emphasis added).

The Supreme Court has thus recognized, albeit in dicta, that the purpose of the DEFRA's child support disregard provision was to mitigate the harsh effects of the Act's mandatory filing unit provision.[6] In light of the context in which § 602(a)(8)(A)(vi) was passed and the Supreme Court's explicit pronouncement in Bowen v. Gilliard, 483 U.S. at 594, 107 S.Ct. at 3013, and because the Secretary's position is wholly without support, the court concludes that Congress intended § 602(a)(8)(A)(vi) to serve as a mitigating force to the DEFRA's mandatory filing unit provision.

In light of the court's conclusion that Congress enacted the DEFRA's child support disregard provision as a means of mitigating the burdens imposed by the Act's mandatory filing unit provision, the Secretary's self-serving interpretation of the phrase "any child support payments" as excluding support payments made by an absent parent in the form of a child's social security insurance benefits is both irrational and patently inconsistent with congressional intent. Certainly, the

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[6] The court recognizes that the language quoted from Bowen may also be read to support the Secretary's position that only child support payments "collected by the state" trigger the $50.00 disregard. However, such a reading would be in conflict with the plain meaning of the statutory language which, as discussed supra, "includes" and is therefore not limited to payments collected by the state. Moreover, such a reading requires an inference that the Supreme Court intended to make a specific statement regarding the scope of the $50.00 disregard provision. Since that issue was not before the Court, it is more likely that the quoted language is a general statement intended merely to indicate the purpose underlying the $50.00 disregard and pass through provisions as mitigating the burden imposed on AFDC recipients by the mandatory filing unit provision.

burdens imposed by the DEFRA's mandatory filing unit provision fall equally onto AFDC families where the absent parent is working and families where the absent parent is unable to work and supports the child through social security benefits that the parent earned while working. Likewise, the benefits of the $50.00 disregard must enure equally to the two classes of AFDC families. Because the Secretary's narrow reading of the statute is irrational and inconsistent with congressional intent, judicial deference to that interpretation is unwarranted. See N.L.R.B. v. United Food & Com'l Wkrs. Union, 484 U.S. 112, 108 S.Ct. at 421; Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. at 844, 104 S.Ct. at 2781-82; Smith v. Heckler, 820 F.2d at 1094.

The Secretary's final argument is that his interpretation of the term "any child support payments" should be upheld because plaintiffs' reading of the term to include child's social security insurance benefits would be at cross-purposes with the budget reduction goal of the Deficit Reduction Act. Although the Act's name implies otherwise, the Deficit Reduction Act contains a mixture of provisions only some of which serve to reduce government expenditures. In construing a statute, courts must avoid the simplistic assumption that whatever furthers the broad purposes of a statute must be the law. See Rodrigues v. United States, 480 U.S. 522, 525-26, 107 S.Ct. 1391, 1393, 94 L.Ed.2d 533 (1987). "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be

sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent to assume that whatever furthers the statute's primary objective must be the law." Id. (emphasis in original). Accordingly, the court is unwilling to assume that the government's otherwise insupportable rationale for counting a child's social security benefits as "income" to the family unit, but refusing to recognize such payments as child support for purposes of the child support disregard provision, should be upheld merely because that interpretation serves the budget reduction allegedly envisioned in the Deficit Reduction Act.

The court concludes that the Secretary's refusal to recognize a child's social security benefit payments as child support within the meaning of § 602(a)(8)(A)(vi) is inconsistent with both the plain meaning of the statutory language and the congressional intent underlying the statute. Congress intended the disregard for "any child support payments" to include support payments made by or for an absent parent for the use and benefit of the dependent child regardless of whether the payments come directly from the working non-custodial parent or indirectly through social security insurance benefits that parent earned while working.

For the foregoing reasons and good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that third-party defendant's cross-motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: October 11, 1989.

RAUL A. RAMIREZ, JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
DEC 6 1989
JOSEPH F. SPANIOL, JR.

No. 89-535

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELIZABETH STROOP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

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1. In our petition, we explained that the term "child support payments" ordinarily refers to payments by parents to support their children, and not to social security benefits. Pet. 9-12. As evidence of that general usage, we pointed to the repeated use of the term "child support" in the AFDC statute and in other statutes to refer to parental payments, and we pointed out that the term is not used in those sources to refer to social security benefits, including child's insurance benefits. In response, respondents fail to cite a single instance of the use of the term "child support" in a federal statute to refer to social security benefits; instead, they rely on state court decisions which allow child's insurance benefits to satisfy state child support obligations. Resp. Br. in Opp. 8-9 nn. 1 & 2. As the Eighth Circuit has concluded, however, it is inappropriate to rely on such state court interpretations of state child support obligations to interpret the scope of the federal child support disregard provision,

particularly because the varying state laws would lead to inconsistent results. *Todd* v. *Norman*, 840 F.2d 608, 611 (8th Cir. 1988).[1]

In our petition, we also pointed out that a 1988 amendment confirms that the "child support" disregard refers to payments from absent parents. Pet. 14-15. Like the court of appeals, however, respondents fail to address the meaning or effect of this legislation.

2. Although acknowledging that the "disregard statute contains no definition of 'child support' " (Resp. Br. in Opp. 7), respondents nevertheless contend that the Secretary's interpretation of that term is not entitled to deference. *Id.* at 12-13. Respondents' examples of the Secretary's purported "arbitrary, contradictory and irrational" interpretations (*id.* at 12) establish nothing of the kind. Respondents' only examples are (1) the Secretary's interpretation that voluntary parental child support payments are entitled to the child support disregard and (2) the Secretary's interpretation that spousal support payments are entitled to the child support disregard.

Both interpretations, however, are consistent with the Secretary's determination that the disregard for "child support" payments applies to payments from absent parents. With respect to voluntary child support payments, the fact

[1] Respondents also reject the significance of the repeated reference to "child support" in the AFDC statute as parental payments (Pet. 10 n.6) because one of these provisions itself refers to state law. Resp. Br. in Opp. 8. The critical point, however, is that, like the twenty other cited provisions, the provision emphasized by respondents (42 U.S.C. 662(b)) clearly refers to parental payments. The reference to state law in the provision is necessary because that provision defines the "child support" obligations which may be assigned to the State pursuant to 42 U.S.C. 659; it has nothing to do with the characterization of "child support" payments as anything other than a parental obligation.

that payments are made voluntarily does not alter the character of the payments. And with respect to spousal support payments, the AFDC statute consistently treats "child and spousal support payments" together because they are both paid by an absent parent or spouse to the AFDC household. See 42 U.S.C. 652(a)(7); 42 U.S.C. 654. Consequently, it was reasonable for the Secretary to treat them similarly for purposes of the child support disregard. This is particularly true because collection of both child support and spousal support is extremely difficult, and the incentive rationale for the $50 disregard, which the Secretary has accepted (Pet. 12-13), is applicable in both instances.[2]

3. Respondents recognize (Resp. Br. in Opp. 14) that the court of appeals' decision regarding the child support disregard conflicts with the Eighth Circuit's decision in *Todd* v. *Norman, supra*. They contend, however, that the split does not warrant this Court's review because several district and state courts have agreed with the Fourth Circuit (Resp. Br. in Opp. 14-16), and they minimize the significance of a recent state court decision which agreed with the Eighth Circuit.[3] However, the Fourth Circuit and the Eighth Circuit are the only federal appellate courts that have addressed the scope of the "child support" disregard, and they are

[2] Respondents' "statement of the case" misstates the applicable regulations. According to respondents, "[t]he regulations implementing the disregard statute exempt the first $50 of only those support monies which are collected by a IV-D agency [the state agency responsible for child support collection]." Resp. Br. in Opp. 3. As respondents recognize elsewhere in their response (*id.* at 14-15), however, child support payments received directly by the AFDC household also receive the $50 per month child support disregard. 50 Fed. Reg. 34,693 (1985).

[3] Respondents' statement that the recent decision in *Baylor* v. *New Jersey Dep't of Human Services*, 235 N.J. Super. 22, 561 A.2d 618 (1989) is based on state law (Resp. Br. in Opp. 14) ignores the fact that the *Baylor* court expressly "accept[ed] the reasoning of the *Todd*

squarely in conflict. Contrary to respondent's contentions (Resp. Br. in Opp. 14-15), the Eighth Circuit's opinion is well-reasoned, and will have continuing vitality. In light of this clear split in the Circuits, the issue is ripe for resolution by this Court.

4. Respondents also suggest that the issue does not warrant review because the estimated annual cost of $43.8 million is a relatively small portion of the overall AFDC budget. Resp. Br. in Opp. 16-17. We respectfully disagree with respondents' assessment of the fiscal importance of almost $44 million annually, particularly in the context of a provision of the Deficit Reduction Act. Respondents confirm, moreover, that the reach of their argument is not limited to the inclusion of child's insurance benefits as "child support payments";[4] if other types of government benefits are also included in an expansive view of the child support disregard, the total cost would be significantly higher than the estimated amount.[5]

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majority [in the Eighth Circuit case] as the more persuasive authorities on the present issue." 561 A.2d at 624.

In addition to the decisions cited in our petition (Pet. 18 nn. 15 & 16) and in the response (Resp. Br. in Opp. 14 & n.3), a Pennsylvania appellate court recently followed the Fourth Circuit's decision and determined that child's insurance benefits were entitled to the disregard. See *Springer* v. *Dep't of Public Welfare*, 562 A.2d 1033 (Pa. Commw. Ct. 1989).

[4] See Resp. Br. in Opp. 16 (claiming that "the trend of the decisions is running strongly in the direction of applying the disregard to *any* child support, including Title II").

[5] Cf. Pet. 19 & n.18 (citing cases presenting claims that veterans' benefits are entitled to the AFDC "child support" disregard).

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DECEMBER 1989

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Supreme Court, U.S.
FILED
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No. 89-535

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELIZABETH STROOP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1989
CERTIORARI GRANTED JANUARY 8, 1990

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-535

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JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

No. 86-0398

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND, KAREN B. CARTER; PAULA JONES; CORY P. JONES BY HIS NEXT FRIEND, PAULA JONES; DAVID L. JONES; ELIZABETH STROOP; MELISSA LAM BY HER NEXT FRIEND, ELIZABETH STROOP; BRET LAM BY HIS NEXT FRIEND, ELIZABETH STROOP; JAMIE STROOP BY HER NEXT FRIEND, ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCLANAHAN BY HER NEXT FRIEND, GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER BY HIS NEXT FRIEND, DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES AND LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1986		
June 19	1	Pltf's Motion for Leave to Proceed In Forma Pauperis, filed with affidavits

DATE	NR	PROCEEDINGS
June 23	2	ORDER PERMITTING PLTFS TO PROCEED IFP, that pltfs be permitted to file their Complaint and to prosecute action without payment of fees or court costs, ent. 6-23-86, RLW, filed. Copies mailed.
June 23	3	Pltf's Complaint, filed. No jury.
June 23	4	Pltf's Motion for TRO, filed
June 23	5	Pltf's Memo. in Support of Motion for TRO, filed with appendix
June 23	6	Pltf's Motion to Maintain Class Action, filed
June 23	7	Pltf's Memo. in Support of Motion for Class Certification, filed
June 23	8	Pltf's Notice of Motion for Cert. of Class & Motion for TRO on 6-23-86 at 4:00 p.m., filed
June 23	–	Summonses issued and deld to Marshal
June 23		IN OPEN COURT: Williams, J., Kull, OCR. Appearances: Parties by counsel. Matter came on for hearing on pltfs' motion for TRO. Counsel heard. TRO to issue; to be in effect for 10 days. Court required no bond be posted by pltfs. (:52)
June 23	9	Temporary Restraining Order conditionally certifying class for purpose of TRO; enjoining defts from reducing or terminating pltfs' AFDC benefits; enjoining defts from requiring assignment of child support to DSS

DATE	NR	PROCEEDINGS
		and from assuming income of independently supported children; directing state deft within 30 days to re-evaluate all AFDC applications filed on or after 6/1/86 & make appropriate adjustments; enjoining defts from taking any further action to implement regulations pending hearing scheduled on 7/3/86; enjoining federal deft from taking action against state for non-compliance; directing TRO to issue without payment of security by pltfs; ent'd, RLW, filed. Copies to counsel.
July 2	10	Pltfs' Motion for Extension of TRO and Brief in Support, filed,
July 2	11	ORDER that TRO entered on June 23, 1986 be extended pending outcome of this litigation or further order of Court. The provision In Re State Deft. being directed to review all voluntary closures of AFDC cases etc., is made a part of the extended TRO. ENT 7-2-86, RLW, and filed. Copies mailed.
July 15	–	Return on Summonses, Executed, and filed.
July 23	12	ORDER that Defts Bowen and Lukhard file Motions to Dismiss, or Motions for Summary Judgment no later than August 18, 1986. Pltfs to file responsive briefs and, if appro-

DATE	NR	PROCEEDINGS
		priate, Cross-Motions for Summary Judgment by Sept. 12, 1986. Reply briefs shall be filed by Sept. 22, 1986. Within 5 days thereafter, parties are to contact Court's chambers for date to argue. ENT 7-23-86, RLW, and filed. Copies mailed.
July 23	13	Scheduling Order, ent 7-23-86, RLW, and filed. Copies mailed.
July 28	14	Answer of Wm L. Lukhard, State Defendant, Filed.
Aug. 18	15	Federal Deft's Memorandum of Points and Authorities in Support of His Motion To Dismiss Or, Alternatively, For Summary Judgment, With Exhibits, Filed.
Aug. 18	16	Deft's Motion to dismiss Or, In the Alternative, Motion For Summary Judgment On Behalf of Deft. Bowen, Filed.
Aug. 18	17	Federal Deft's Memorandum In Opposition to Pltf's Motion For Class Certification, Filed.
Aug. 21	18	Memorandum in Support of State Deft's Motion for Summary Judgment, filed.
Aug. 21	19	State Deft's Motion for Summary Judgment, filed.
Sept 15	20	Pltfs' Cross-Motion for Summary Judgment, filed.

DATE	NR	PROCEEDINGS
Sept 15	21	Pltfs' Memorandum in Support of Cross-Motion for Summary Judgment, filed, with Attachments.
Sept 22	22	Federal Deft's Reply to Brief in Support of Pltfs' Cross-Motion for Summary Judgment, filed.
Sept 23	23	Pltfs' Reply to Federal Deft's Memorandum in Opposition to Pltfs' Motion for Class Certification, filed.
Nov. 17	24	ORDER that Counsel are DIRECTED that within twenty-four hours after the Court of Appeals for Fourth Circuit issues its opinion in these cases, they are to move this Court to reactivate this case and they must reschedule a hearing on motions for summary judgment. In the interim, Clerk is DIRECTED to put case on inactive status and to not receive any pleadings in case until counsel present an order requesting the case be reactivated. ENT 11-17-86, RLW, and filed. Copies mailed.
1987		
Sept. 8	25	Deft Bowen's Motion to Excuse noncompliance with Order of 11/17/86 and Brief in support filed.
Sept. 8	26	Deft Bowen's Motion to Reactivate case & Brief in support filed.
Sept. 14	27	Pltfs' Motion to Excuse Noncompliance w/Court Order Filed 11/17/86, & Brief in Support, filed.

DATE	NR	PROCEEDINGS
Sep. 14	28	Pltfs' Response to Deft Bowen's Motion to Reactivate This Case and Statement of Remaining Claims, and Pltfs' Motion for Leave to File Supplemental Brief Before Oral Argument on Cross Motions for Summary Judgment and Brief in Support, filed.
Sep. 28	29	Deft Lukhard's Motion to Excuse Noncompliance with Court Order Filed 11/17/86 and Brief in Support, filed.
Sep. 29	30	ORDER that Pltf & Deft Bowen are excused from non-compliance and shall follow briefing schedule as set out in this Order. ENT 9/29/87, RLW, filed. Cps. mailed.
Oct. 5	31	ORDER that Deft Lukhard is excused from non-compliance and shall follow briefing schedule as set out in this Order. ENT 10/5/87, RLW, filed. Cps. mailed.
Oct. 20	32	Pltfs' Supplemental Brief in Support of Cross-Motion for Summ. Judg., filed.
Nov. 6	33	Deft's Reply to Supplemental Brief in Support of Pltfs' Cross-Motion for Summary Judgment, filed.
Nov. 19	34	ORDER that J. Aliperti, Esq. is GRANTED an extension until 11/18/87 to file reply to Defts' brief. ENT 11/19/87, RLW, filed. Cps. mailed.

DATE	NR	PROCEEDINGS
Nov. 19	35	Deft Lukhard's Supplemental Reply to Pltf's Cross-Motion for Summary Judgment, filed.
Nov. 19	36	Deft Lukhard/Jackson's Motion for Order of Substitution of Deft, filed.
Nov. 23	–	SO ORDERED that Larry D. Jackson is substituted as Deft 2 in lieu of Wm. L. Lukhard. ENT 11/23/87, RLW, filed. Cps. mailed.
Nov. 30	37	Pltfs' Reply Brief in Support of Pltfs' Cross-Motion for Summary Judgment, filed.
Dec. 15	–	IN OPEN COURT: Williams, J., V. Halasz, OCR. Appearance: Parties by counsel. Matter came on for hearing on parties' cross motions for summary judgment. Counsel heard. Ruling given from the bench. Defts' motion for summary judgment granted as to issue of inclusion of Title II Soc Security benefits. Pltfs' motion for summary judgment granted as to issue of $50.00 disregard provision. Court to issue memorandum and final order. (:45)
Dec. 21	38	MEMORANDUM OPINION of Court. ENT 12/21/87, RLW, filed. Cps. mailed.
Dec. 21	39	FINAL ORDER that Pltfs' statutory & constitutional claims of children receiving child support pymts. & the claims of the non-custodial parents

DATE	NR	PROCEEDINGS
		who are paying child support are voluntarily DISMISSED. The portion of the Defts' summary judgment motion which addresses the inclusion of children receiving Title II Social Security benefits in the AFDC assistance unit is GRANTED. The portion of the Pltfs' summary judgment motion which challenges the inclusion on statutory and constitutional grounds is DENIED. The portion of the Defts' summary judgment motion which asked the Court to uphold the Secy.'s refusal to disregard the 1st $50 of Social Security benefits paid to AFDC families is DENIED, & that part of the Pltfs' summary judgment motion challenging the Sec'y.'s interpretation of 42 USC § 602(a)(8)(A)(vi) is GRANTED. The TRO imposed by the Court's orders dated 6/23/86 & 7/2/86 is VACATED. ENT 12/21/87, RLW, filed. Cps. mailed.
Dec. 31	40	Pltfs' Petition for an Award of Attys.' Fees & Costs, filed w/Affidavits.
Dec. 31	41	Pltfs' Memorandum in Support of Petition, filed.
1988		
Jan. 6	42	Deft HHS's Motion to Alter or Amend Judgment and Brief in Support, filed.

DATE	NR	PROCEEDINGS
Jan. 15	43	Deft HHS's Motion for Extension to Respond to Pltfs' Petition for Atty. Fees, filed
Jan. 19	44	ORDER that Deft HHS may respond to Pltfs' Petition for Atty. Fees when Court rules on Deft HHS' Motion to Alter Judgment. If motion denied, respond w/in 10 days. ENT 1/19/88, RLW, filed. Cps. mailed.
Jan. 19	45	State Deft's Reply to Pltfs' Petition for Atty. Fees, filed.
Jan. 26	46	Pltf's Reply Brief in Opposition to Deft HHS's Motion to Alter or Amend, filed.
Jan. 29	47	Deft HHS's Reply to Pltf's Brief in Opposition to Federal Deft's Motion to Alter or Amend Judgment, filed.
Feb. 9	48	Pltfs' Response to Defts' Reply Brief for Their Motion to Amend Judgment, filed.
Mar. 4	49	MEMORANDUM OPINION of the Court. ENT 3/4/88, RLW, filed. Cps. mailed.
Mar. 4	50	FINAL ORDER that Deft HHS's motion to alter or amend 12/21/87 judgment is DENIED. ENT 3/4/88, RLW, filed. Cps. mailed.
Mar. 18	51	Deft HHS's Response in Opposition to Pltfs' Petition for Attys' Fees & Costs, filed.

DATE	NR	PROCEEDINGS
Apr. 7	52	Pltfs Powers & McClanahan's Notice of Change of Counsel's Address (J.B. Aliperti, Esq.), filed.
Apr. 7	53	Pltfs Powers & McClanahan's Notice of Hearing 4/28/88 at 9:00 a.m., filed.
Apr. 25	54	Pltfs' Reply Brief in Support of Attorneys' Fees, filed w/Affidavit of J. Hanken.
Apr. 28	–	IN OPEN COURT: Williams, J., V. Halasz, OCR. Parties by counsel. Matter came on for hearing on Pltfs' Motion for Atty. Fees. Arguments had. Motion granted but attorney Fees will be awarded only against the State Deft. in the sum of $10,074.25 and this award will be stayed pending appeal. Order to enter.
Apr. 28	55	JUDGMENT ORDER that Pltfs are awarded attys.' fees of $10,618.00. JUDGMENT for $10,618.00 is ENTERED for Pltfs against only the State Deft in his official capacity. The fed. Deft is not liable to Pltfs for attys.' fees. Execution on this Judgment is STAYED pending appeal & final decision by USCA on fed. Deft's appeal. If State Deft appeals, execution on this Judgment shall remain stayed w/out State Deft having to post appeal bond. ENT 4/28/88, RLW, filed. Cps. mailed.
May 3	56	Deft HHS's Notice of Appeal, filed.

DATE	NR	PROCEEDINGS
May 17	57	Pltfs' Notice of Cross-Appeal, filed.
May 18	–	TPO pkgs. sent to counsel for Deft HHS & Pltfs.
May 18	–	Record of Appeal, Vols. I, II & III del'l to USCA.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2530

ELIZABETH STROOP; MELISSA LAM BY HER NEXT FRIEND, ELIZABETH STROOP; BRET LAM BY HIS NEXT FRIEND, ELIZABETH STROOP; JAMIE STROOP BY HER NEXT FRIEND, ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCLANAHAN BY HER NEXT FRIEND, GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER BY HIS NEXT FRIEND, DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

AND

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND, KAREN B. CARTER; PAULA JONES; CORY P. JONES BY HIS NEXT FRIEND, PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

OTIS R. BOWEN, SECRETARY, HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT

AND

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

DOCKET ENTRIES

DATE	PROCEEDINGS
5/3/88	Civil case docketed. (db) [88-2530]
5/4/88	Clerk order filed requiring joint brief per side. Copies to all counsel. [88-2530] (db) [88-2530]
5/4/88	Docketing notice issued. [88-2530] (db) [88-2530]
5/9/88	Disclosure statement filed by Appellee (n). [88-2530] (db)
5/11/88	Disclosure statement filed by Appellee (n). [88-2530] (db) [88-2530]
5/16/88	Disclosure statement filed by Crystal McClanahan, Geneva Powers (n). [88-2530] (db) [88-2530]
5/26/88	Docketing statement filed by Appellant in 88-2538 [917653-1] T/S needed: n; T/S already on file: [88-2538] (db) [88-2538]
5/31/88	Docketing statement filed by Appellant in 88-2530 [917789-1] T/S needed: n; T/S already on file: [88-2530] (db) [88-2530]
6/3/88	Clerk order filed consolidating case(s) 88-2538 with 88-2530 for briefing and oral argument. XAP Appellant: Sec. Bowen Copies to all counsel. [88-2530, 88-2538] (db) [88-2530 88-2538]
6/3/88	Record on appeal filed. (Pleadings: Vols. I-III T/S: Exhibits: Depositions: Other: SEALED Vol: [88-2530, 88-2538] (db) [88-2530 88-2538]
6/3/88	Docketing notice issued. [88-2538] (db) [88-2538]
6/6/88	Cross-appeal briefing order filed. A/P brief due: 07/18/88; Projected calendar: December 1988. [88-2530, 88-2538] (db) [88-2530 88-2538]
6/15/88	Disclosure statement filed by Appellant Karen B. Carter in 88-2538 (n). [88-2538] (db) [88-2538]

DATE	PROCEEDINGS
6/20/88	Disclosure statement filed by Larry D. Jackson in 88-2538 (n). [88-2538] (db) [88-2538]
7/19/88	Cross-brief joint appendix filed by Appellee in 88-2530, Appellant in 88-2538. Type of Service: cs Copies of brief: 12 # pages: 23 Copies of apx: 6 # pages: 88. Sufficient [Y/N]: y. [88-2530, 88-2538] (bm) [88-2530 88-2538]
8/16/88	Amicus curiae brief filed by Center for Law and Social Policy. Type of Service: HD Copies of brief: 12 # pages: 32. Sufficient [Y/N]: n. Needs motion for leave to file Amicus brief. [88-2530, 88-2538] (jc) [88-2530 88-2538]
8/17/88	Motion filed by CLASP to file amicus brief [1124277-1] [88-2530, 88-2538] (db) [88-2530 88-2538]
8/18/88	Cross-brief filed by Appellee Elizabeth Stroop in 88-2530, Appellant Elizabeth Stroop in 88-2538. Type of Service: pm Copies: 5 # pages: 44. Sufficient [Y/N]: n. only filed 5 copies of brief. [88-2530, 88-2538] (bm) [88-2530 88-2538]
8/19/88	OSC case referred to clerk for calendaring [88-2530, 88-2538] (jlp) [88-2530 88-2538]
8/19/88	Clerk order filed granting motion to file amicus brief [1124277-1] in 88-2530, 88-2538 Copies to all counsel. [88-2530, 88-2538] (db) [88-2530 88-2538]
9/14/88	Motion filed by Appellant Bowen, Sec in 88-2530 to extend time to file brief until 10/20/88 [1141785-1] [88-2530] (db) [88-2530]

DATE	PROCEEDINGS
9/15/88	Clerk order filed granting motion to extend time to file brief [1141785-1] until: 10/20/88 Copies to all counsel. [88-2530] (db) [88-2530]
10/19/88	Case calendared for oral argument. [88-2530, 88-2538] (ca) [88-2530 88-2538]
10/20/88	Reply and answering brief filed by Appellant Bowen, Sec in 88-2530, Appellee Bowen, Sec in 88-2538. Type of Service: cs Copies: 12 # pages: 35. Sufficient [Y/N]: y. [88-2530, 88-2538] (bm) [88-2530 88-2538]
11/8/88	Cross-reply brief filed by Appellee in 88-02530, Appellant in 88-02538. Type of Service: pm Copies of brief: 5 # pages: 12. Sufficient [Y/N]: y. [88-2530, 88-2538] (bm) [88-2530 88-2538]
12/8/88	Oral argument heard. Courtroom Deputy: dad. [88-2530, 88-2538] (dad) [88-2530 88-2538]
12/21/88	Motion filed by Bowen, Sec in 88-2530, Bowen, Sec in 88-2538 to file post-argument memo material(s) [1178009-1]. [88-2530, 88-2538] (db) [88-2530 88-2538]
12/27/88	Response [1178419-1] to motion to file certain material [1178009-1] in 88-2530 filed by Appellee in 88-2530. [88-2530, 88-2538] (db) [88-2530 88-2538]
1/3/89	Court order filed by FDM, RFC, JDB granting motion to file certain material [1178009-1] in 88-2530, granting motion to file certain material [1178009-1] in 88-2538 Copies to all counsel. [88-2530, 88-2538] (db) [88-2530 88-2538]

DATE	PROCEEDINGS
3/28/89	Published authored opinion filed. [88-2530, 88-2538] (db) [88-2530 88-2538]
3/28/89	Judgment order filed. Terminated on the Merits after . Oral Hearing; Affirmed; Written, Signed, Published. JDB, Authoring Judge, FDM, RFC, [88-2530, 88-2538] (db) [88-2530 88-2538]
4/5/89	Motion filed by Appellant Bowen, Sec in 88-2530, Appellee Bowen, Sec in 88-2538 to extend time to file petition for rehearing 05/11/89 [1212835-1] [88-2530, 88-2538] (db) [88-2530 88-2538]
4/6/89	Clerk order filed granting motion to extend time to file pet reh [1212835-1] in 88-2530, 88-2538 Copies to all counsel. [88-2530, 88-2538] (db) [88-2530 88-2538]
4/7/89	Bill of costs filed by Appellant Elizabeth Stroop in 88-2538. [88-2538, 88-2530] (rm) [88-2530 88-2538]
5/10/89	Petition filed by Appellant Bowen, Sec in 88-2530, Appellee Bowen, Sec in 88-2538 for rehearing. Number copies filed: 16 [1225820-1], for suggestion for rehearing in banc. Number of copies filed: 16 [1225820-2] [88-2530, 88-2538] (dad) [88-2530 88-2538]
5/15/89	Federal Reporter Citation: 870 F.2d 969. [88-2530, 88-2538] (st) [88-2530 88-2538]
5/31/89	Court order filed by FDM, RFC, JDB denying motion for rehearing [1225820-1] in 88-2530, denying motion for rehearing [1225820-1] in 88-2538, denying motion for suggestion for reh in banc [1225820-2] in 88-2538 Copies to

DATE	PROCEEDINGS
	all counsel. [88-2530, 88-2538] (dad) [88-2530 88-2538]
6/9/89	Mandate issued. [88-2530, 88-2538] (rm) [88-2530 88-2538]
10/10/89	Supreme Court notice received of filing of petition for certiorari on 09/28/89. Supreme Court No. 89-535. [88-2530, 88-2538] (rm) [88-2530 88-2538]
11/13/89	Supreme Court notice received of filing of petition for certiorari on 11/01/89. Supreme Court No. 89-5954 [88-2530, 88-2538]. (rm) [88-2530 88-2538]
1/10/90	Supreme Court order filed granting petition for certiorari. Supreme Court No. 89-535 [88-2530, 88-2538] (rm) [88-2530 88-2538]
1/12/90	Supreme Court order filed denying petition for certiorari on 01/08/90. Supreme Court No. 89-5954 [88-2530, 88-2538] (rm) [88-2530 88-2538]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 86-0398-R

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND, KAREN B. CARTER; PAULA JONES; CORY P. JONES BY HIS NEXT FRIEND, PAULA JONES; DAVID L. JONES; ELIZABETH STROOP; MELISSA LAM BY HER NEXT FRIEND, ELIZABETH STROOP; BRET LAM BY HIS NEXT FRIEND, ELIZABETH STROOP; JAMIE STROOP BY HER NEXT FRIEND, ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCLANAHAN BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER BY HIS NEXT FRIEND, DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

OTIS R. BOWEN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES AND WILLIAM L. LUKHARD, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS

[FILED June 23, 1986]

COMPLAINT

I.

PRELIMINARY STATEMENT

1. On July 1, 1986, the Virginia Department of Social Services (DSS), administered by Defendant Lukhard, plans to implement new federal provisions in Virginia's

Aid to Dependent Children Program (AFDC). Section 2640 of the Deficit Reduction Act of 1984 (Pub.L. 98-369) (codified at 42 U.S.C. § 602(a)(38). These provisions will dramatically and unlawfully reduce to sub-poverty levels the monthly incomes of hundreds of low income households in Virginia.

2. The program change will require children who are currently independently supported with child support payments or Social Security benefits to become members of the AFDC assistance unit and divert that child's income to support the entire family.

3. Plaintiffs are the children who are independently supported, the children who need AFDC for their income subsistence, their caretakers, and the non-custodial parents who pay child support to children who do not receive AFDC. They seek declaratory and injunctive relief to prevent this unlawful taking of income and challenge defendant's policy as violating the Fifth, Tenth, and Fourteenth Amendments to the United States Constitution, the Social Security Act, 42 U.S.C. § 401 *et seq.*, and the purpose and provisions of the AFDC program. 42 U.S.C. § 601.

II.

JURISDICTION

4. The court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and § 1343(3). Plaintiffs' claims are authorized by 42 U.S.C. § 1983.

5. Declaratory relief is authorized by 28 U.S.C. § 2201 and § 2202, and Rule 57 of the Federal Rules of Civil Procedure. Injunctive relief is authorized by 26 U.S.C. § 7402(a) and Rule 65 of the Federal Rules of Civil Procedure.

III.

PLAINTIFFS

6. Plaintiff Karen B. Carter is an adult citizen of Henrico County, Virginia. She resides with her minor children, Planitiff Ragene Carter (age 12) and Shaniece Carter (age 10 months).

7. Plaintiff Paula Jones is an adult citizen of Roanoke, Virginia. She resides with her minor children, Plaintiff Cory Jones (age 5) and Eric Byrd (age 9).

8. Plaintiff David L. Jones is an adult citizen of Roanoke, Virginia. He is divorced from Plaintiff Paula Jones and sends her regular child support payments for the support of his son, Plaintiff Cory Jones.

9. Plaintiff Elizabeth Stroop is an adult citizen of Harrisonburg Virginia. She resides with her minor children, Plaintiff Melissa Lam (age 13), Plaintiff Bret Lam (age 10) and Plaintiff Jamie Stroop (age 3).

10. Plaintiff Geneva Powers is an adult citizen of Tazewell County Virginia. She resides with her minor children, Plaintiff Crystal McClanahan (age 9), Nancy Powers (age 9), Nancy Powers (age 16) and Loretta Powers (age 13).

11. Plaintiff Dorothy Brown is an adult citizen of Norfolk Virginia. She resides with her minor children, Plaintiff, Robert Turner (age 11) and Kervin Brown (age 6).

IV.

DEFENDANTS

12. Defendant Otis R. Bowen is the Secretary of the Department of Health and Human Services (hereinafter HHS) and is responsible for the adoption and implementa-

tion of regulations to administer the provisions of the AFDC program in a manner consistent with federal law.

13. Defendant William L. Lukhard is the Commissioner of the Virginia Department of Social Services (hereinafter DSS) and, as such, is responsible for the general administration and implementation of laws concerning the social welfare of the people of the Commonwealth of Virginia. Defendant Lukhard is designated the chief administrative officer of DSS and is charged with the ultimate control and administration of DSS.

V.

CLASS ACTION

14. Plaintiffs bring this action on their own behalf and on behalf of their minor children, both on and not on assistance, and pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2), on behalf of all persons similarly situated. These persons have suffered or will suffer a termination, decrease, or refusal of AFDC or the loss of the full use and benefits of child support or Social Security income paid on behalf of the independently supported child in the family.

15. They seek to represent four classes of persons in Virginia asserting similar interests and consisting of:

A. All children in Virginia who now or in the future will receive Social Security or child support payments who do not need to apply for AFDC has been sought, who must be included in the AFDC assistance unit under the defendants' policies. Plaintiffs Ragene Carter, Cory Jones, Melissa Lam, Bret Lam, Crystal McClanahan, and Robert Turner represent this class.

B. All AFDC recipients or applicants in Virginia whose AFDC is, was, or will be reduced, terminated or denied due to the consideration of the income of the children described in Class A. Plaintiffs Karen B. Carter, Paula Jones, Elizabeth Stroop, Jamie Stroop, and Dorothy Brown represent this class.

C. All persons in Virginia who are or will be representative payees of Social Security benefits or the payee of child support payment for the children described in Class A. Plaintiffs Karen B. Carter, Paula Jones, Elizabeth Stroop, Geneva Powers and Dorothy Brown represent this class.

D. All non-custodial parents of the children described in Class A whose parental support is now or will be assigned to DSS or considered as income support for other persons in his child's household. Plaintiff David Jones represents this class.

16. The requirements of Federal Rules of Civil Procedure 23(a) are met as follows:

a. The class is so numerous that joinder of all members is impracticable. The state defendant has estimated that approximately 17,000 persons currently receiving AFDC could potentially be affected by the policy.

b. There are questions of law and fact common to the class.

c. The claims of the representative parties are typical of the respective classes.

d. The representative parties will fairly and adequately protect the interests of the class inasmuch as they have no interests which are antagonistic to the in-

terests of other class members and are represented by certain counsel experienced in this type of litigation.

17. The requirements of Rule 23(b)(2) are met in that the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

VI.

FACTS

A. Statutory and Regulatory Framework

The AFDC Program

18. The Aid to Families with Dependent Children Program (AFDC) is authorized under Title IV of the Social Security Act, 42 U.S.C. §§ 601 *et seq.* Its purpose is to provide financial assistance to the families of needy children who are deprived of parental support or care by reason of the death, continued absence from the home, unemployment, or incapacity of a parent. 42 U.S.C. §§ 606(a), 607.

19. The AFDC program is administered in Virginia pursuant to a plan adopted by the state in accordance with specific requirements set forth in 42 U.S.C. § 602(a). Federal funds are provided to Virginia to pay for part of the cost of the financial assistance provided under the plan when it meets these requirements. 42 U.S.C. § 603.

20. Under the requirements of § 602(a)(7), the state agency, Virginia DSS, must, in determining the need of a dependent child,

> take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. . . .

21. Section 602(a)(7) requires the counting of only such income as is "actually available" to meet the needs of the dependent child on AFDC, including any income which such child "has the legal ability" to make available for his/her support or maintenance. 45 C.F.R. § 233.20(a)(3)(ii)(D).

22. Section 651 *et seq.* of 42 U.S.C. establishes an organizational division within the state welfare agencies, the IV-D Child Support and Paternity Establishment Unit, specifically to obtain and enforce child support orders and thereby reduce the welfare rolls. The IV-D Unit must assist both AFDC and non-AFDC families in collection of child support.

23. Effective October 1, 1984, 42 U.S.C. § 602(a) was amended by § 2640(a) of the Deficit Reduction Act of 1984, Pub. L. 98-369, to add a further state plan requirement codified at 42 U.S.C. § 602(a)(38). This amendment requires that the state plan shall:

> (38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include:
>
> (A) any parent of such child and
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 406(a), if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding Section 204(j), in the case of benefits provided under Title II); . . . .

24. Defendant Bowen has promulgated an "interim final" regulation effective October 1, 1984 to implement 42 U.S.C. § 602(a)(38). 49 Fed. Reg. 35586, 35599 (September 10, 1984), codified at § 45 C.F.R. § 206.10(a)(1)(vii)(B). It requires that:

> (a) State plan requirements. * * *
>
> (1) * * *
>
> (vii) For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:
>
> (A) . . .
>
> (B) Any blood-related or adoptive brother or sister.

25. Defendant Lukhard had issued state regulations to implement these federal changes, effective on June 1, 1986 for new applications and July 1, 1986 for all existing AFDC cases. 2:13 Virginia Register 1353–1354 (March 31, 1986). The regulation provides in pertinent parts:

> § 1.1 . . . "Assistance unit" means all parents and siblings, both natural and adoptive, of the child for whom assistance is requested. . . .
>
> "Otherwise eligible" means that the individual is not precluded from eligibility by some provision of Part IV-A of the Social Security Act and with respect to children, means they meet the requirements of § 406 (a)(1) and (2) of that Act.
>
> * * * * *

§ 2.1 In order for the family to be eligible for ADC, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:

1. Any natural or adoptive parent; and
2. Any blood related or adopted brother or sister.

* * * * *

26. Defendant Lukhard issued "ADC Transmittal #103" to further implement[] the above state regulation into the Virginia ADC Manual.

27. AFDC Statutory provisions, and federal and state regulations also provide for the consideration of the income of stepparents who reside with children on AFDC. 42 U.S.C. § 602(a)(31), 45 C.F.R. § 233.10(a)(3)(xiv), Virginia ADC Manual § 305.4F. These provisions permit the stepparent to retain an amount equal to the state-established "Standard of Need" and other income deductions, to meet his own needs, before the stepparents' income is assumed available to the children receiving AFDC.

B. FACTS RELATING TO PLAINTIFFS

The CARTER Family

28. Plaintiff Ragene Carter was born in October 1973. About three years later, in August 1976, her parents were divorced. The divorce decree awarded custody of Ragene to her mother, Karen B. Carter, and ordered her father to pay $25.00 a week towards her support. The support order was later modified, increasing the required support payments to $50.00 per week. Ragene's father has faithfully paid his support to Ragene through the Henrico County Court system.

29. The Ragene's child support payments are used to meet Ragene's living expenses, including tuition for the private school she has attended for the last three years.

30. Plaintiff Karen B. Carter had a second child, Shaniece, in July 1985. They receive $231 each month from the AFDC program for their support.

31. On June 17, 1986 Karen B. Carter was orally notified by her DSS caseworker, that, beginning July 1, 1986, Ragene would have to apply for AFDC and that Ragene's support rights would have to be assigned to Virginia. Ragene's $200 to $250 per month of child support would then be paid to DSS, and the family's AFDC check would increase by $60, to $291 per month. In addition, the family would receive $50 of any support paid for Ragene.

32. Karen B. Carter was advised by her caseworker, that, if she refused to apply for AFDC for Ragene, the $231 AFDC payment would be terminated.

33. Faced with the choice of losing $231 AFDC or $90 in total monthly income, Karen B. Carter involuntarily applied for AFDC for Ragene and assigned Ragene's support rights to Virginia. With a 20% loss in income, Karen B. Carter will not be able to provide her family with necessities.

The JONES Family

34. Plaintiffs Paula and David Jones were divorced in 1981. The Jones' divorce decree awarded custody of their son, Cory P. Jones to the custody of his mother.

35. After the divorce, Paula Jones received AFDC benefits for herself and Cory, and her other son Eric Byrd. By Administrative order determined by DSS, David Jones was required to pay $36.00 weekly for Cory's support.

36. David Jones paid child support to DSS while Cory received AFDC. In 1983, Paula Jones was advised by her DSS caseworker that Cory would receive more income support if he did not receive AFDC benefits, but received child support directly from his father. At that time, Cory was removed from the AFDC family unit.

37. Since 1983, David Jones has paid directly to his ex-wife an average of $133 monthly for Cory's support. In addition, Cory stays with his father every weekend, and David Jones spends about $40.00 every weekend on Cory's expenses and their joint activities.

38. Paula Jones and her child Eric, receive AFDC benefits [from] Virginia DSS for their support. They receive $231 per month.

39. In June 1986, Paula Jones was notified by her DSS caseworker that, beginning July 1, 1986, she must apply for AFDC benefits for Cory. She must also assign all of Cory's support payments and his rights to such support to the Commonwealth of Virginia and turn over any support received by her for Cory to DSS.

40. Paula and David Jones do not want Cory to receive AFDC. His financial needs are met by his father's child support payments. David Jones does not want the money he pays for Cory to be assigned to Virginia and used to support children who are not his.

41. If Paula Jones refuses to apply for AFDC for Cory, she understands that her AFDC for herself and Eric will be terminated. If she does apply for AFDC, her family will receive $291 in AFDC and $50 of any child support paid. Depending on whether child support continues to be paid, Paula Jones would lose 6% to 20% of her family's income if Cory receives AFDC, and she will be unable to afford necessities.

The STROOP Family

42. Elizabeth Stroop and her three children live in Harrisonberg Virginia. Melissa (age 13) and Bret (age 10) each receive $319.00 per month in Social Security depend[e]nts' benefits because their father is disabled.

43. The Social Security checks are made payable to Elizabeth Stroop as Representative Payee for Melissa and Bret.

44. As Representative Payee, Elizabeth Stroop takes care to use the money from Social Security to meet Melissa's and Bret's personal needs. She has to file a "Representative Payee Report" with Social Security once a year to verify that the Social Security payments were either spent or saved for Melissa and Bret.

45. Elizabeth Stroop's youngest child Jamie (age 3) is the daughter of her second husband. She and Jamie receive $231.00 each month from the AFDC program.

46. Mrs. Stroop has been told by her DSS caseworker that her AFDC will be stopped on July 1, 1986 because Melissa and Bret have to apply for AFDC, and their Social Security benefits will have to be counted. Her family's income will drop by 26% from $869 per month to $638.

47. If her AFDC check stops, Mrs. Stroop and Jamie will not have any income at all. She will have to use Melissa's and Bret's Social Security income for family expenses. This is not allowed by the Social Security Administration, and Mrs. Stroop fears criminal prosecution.

The POWERS Family

48. Geneva Powers and her three daughters live in Tazewell, Virginia. Her youngest, Crystal (age 9) receives Social Security benefits because her father is deceased.

Crystal's monthly Social Security check is $254 which is paid to Geneva Powers as Representative payee.

49. The family's other income consists of $336 SSI paid to Geneva Powers because she is disabled, and $207 AFDC paid to Nancy and Loretta. O[ccas]ionally, Mrs. Power's receives a $50 check from DSS when child support is paid by her ex-husband for Loretta and Nancy.

50. Geneva Powers has been orally informed by her DSS caseworker that Crystal must be part of the AFDC unit beginning July 1, 1986. When Crystal's Social Security is counted, the AFDC check will be reduced to $11.00. Her family's income will drop by 25% – from $797 to $601.

51. Geneva Powers is afraid that she will be put into jail if she uses Crystal's money for her other daughters' needs, but she does not know how else she can try to meet her family's expenses.

The BROWN Family

52. Dorothy Brown lives with her two sons, Robert Turner (age 11) and Kervin Brown (age 6). Because Robert's father is deceased, Robert receives a Social Security Survivor's check for $457 each month. This amount is based upon his father's work record.

53. As representative payee of Robert's check, Mrs. Brown makes certain that Robert's Social Security is used to meet his financial needs. Robert suffers from asthma and requires regular medical treatment and takes medication daily. Despite his treatment, he has required emergency hospital care several times. Since Robert has no health insurance, his Social Security check is used to meet these medical needs as well as his living expenses.

54. Mrs. Brown and Kervin receive $231 in AFDC benefits each month. They have received notice from DSS

that effective July 1, 1986, Robert must apply for AFDC, and, as a result of counting his income, the AFDC check will be terminated. Her family's income will drop by 34% – from $688 to $457.

55. Mrs. Brown will be unable to support her family on Robert's Social Security check. She is afraid that she could be prosecuted by the Social Security Administration for misusing Robert's money.

IRREPARABLE HARM

56. Each Plaintiff family *currently* lives on a monthly income which is less than the federal poverty guidelines. If defendants' policies are implemented, each family will have less income with which to live. Each family will be unable to afford basic necessities. Each independently supported child will be unable to make full use of his or her own income and will be forced onto the welfare rolls. The custodial parents will be required to violate their legal duties as trustees or representative payees for the child support or Social Security benefits received on behalf of their independently supported children. Non-custodial parents will have income which is intended to benefit their own children diverted to the Commonwealth of Virginia to support unrelated children.

57. Without injunctive relief, plaintiffs and those they represent will suffer irreparable injury.

58. There is no adequate remedy at law to prevent or later compensate plaintiffs for their injuries.

VII. CAUSES OF ACTION

A. Violations of Federal Statutes.

59. The interim final rule promulgated by the defendant Secretary and the regulations issued by the state defendant

are inconsistent with and violate 42 U.S.C. §§ 602(a)(38) and 656(a)(1) in that they mandate inclusion in the AFDC assistance unit and consideration of the income of all co-resident siblings and half-siblings who receive child support or OASDI benefits on the basis of an absent, deceased or disabled parent without regard to whether those children are in fact deprived of parental support as a result of their parents' absence, death or disability.

60. The interim final rule promulgated by the defendant Secretary and the regulations issued by the state defendant are inconsistent with and violate 42 U.S.C. §§ 401 *et seq.*, 42 U.S.C. §§ 602(a)(7), 602(a)(10) and 602(a)(38) in that they presume that the child support and OASDI paymens made for the benefit of siblings and half-siblings residing with AFDC children are income available for the support of those AFDC children without regard to whether that income is in fact legally and actually available to meet the needs of those AFDC children.

B. Violations of the United States Constitution

61. As interpreted by the defendants, the statutory provision and the implementing state and federal regulations violate the Fifth and Fourteenth Amendment Due Process Clauses in that they constitute a taking of property of the children who receive child support or OASDI benefits and a taking of property of the parent providing parental support through those payments without just compensation.

62. As interpreted by the defendants, the statutory provision and the implementing state and federal regulations violate the Fifth and Fourteenth Amendment Due Process Clauses in that they irrebuttably presume that children who receive child support or OASDI benefits through absent, deceased or disabled parents and reside with AFDC

siblings or half-siblings are dependent children and that their income is available for the support of their AFDC siblings or half-siblings without a pre-deprivation hearing to determine whether those children are deprived of parental support or whether any part of their income is actually available to support their AFDC siblings or half-siblings.

63. As interpreted by the defendants, the statutory provision and the implementing state and federal regulations requiring that the child support payments made on behalf of children who happen to reside with siblings or half-siblings receiving AFDC assistance must be deemed available and effectively assigned to the support of those AFDC siblings or half-siblings violate the Tenth Amendment to the United States Constitution in that they impermissibly contradict, circumvent, and otherwise interfere with state court assessments of child support needs and responsibilities.

64. As interpreted by the defendants, the statutory provision and the implementing state and federal regulations violate the Fifth and Fourteenth Amendment Equal Protection Clauses in that the stepparents who reside with children receiving AFDC, who, like siblings, have no legal obligation to support those children, is counted in a more favorable manner than the income of siblings.

65. The statutory provision and the implementing state and federal regulations violate the Fifth and Fourteenth Amendment Equal Protection Clauses in that the children who receive child support payments who are required to apply for AFDC receive a $50 disregarded payment from any support thereafter paid to DSS while children who receive OASDI benefits who are required to apply for AFDC do not receive a $50 disregarded payment.

Prayer for Relief

WHEREFORE, plaintiffs, on their own behalf, their children's behalf, and on behalf of all other persons similarly situated ask this Court to:

A. Assume jurisdiction of this action, and set this cause down promptly for a hearing;

B. Determine by order as soon as practicable, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, that this action may be maintained as a class action;

C. Enter a temporary restraining order, to be made a preliminary injunction and later to be made permanent, ordering that:

1. The defendants are enjoined from requiring that independently supported children with child support or OASDI income must be included in AFDC assistance units or have their income considered in the AFDC assistance units' eligibility and grant amount determinations.

2. The defendants are enjoined from presuming that the child support or OASDI income of independently supported children is available to meet the needs of the AFDC siblings or half-siblings with whom they reside.

D. Enter a declaratory judgment finding that:

1. The Secretary's interim final rule as codified at 45 C.F.R. § 206.10(a)(1)(vii)(B) and the state defendant's regulations, are inconsistent with 42 U.S.C. § 602(a)(7), (10), and (38) and 42 U.S.C. § 401 *et seq.*

2. The Secretary's interim final rule as codified at 45 C.F.R. § 206.10(a)(1)(vii)(B) and the state defendant's regulations violate plaintiffs' rights under the Fifth, Tenth and Fourteenth Amendments of the United States Constitution.

E. Grant to plaintiffs' attorneys reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

F. Grant plaintiffs the costs of this action, and such other and further relief as is just and proper.

Respectfully Submitted,

KAREN B. CARTER, ET AL.
—By Counsel—

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 86-0398-R

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND, KAREN B. CARTER; PAULA JONES; CORY P. JONES BY HIS NEXT FRIEND, PAULA JONES; DAVID L. JONES; ELIZABETH STROOP; MELISSA LAM BY HER NEXT FRIEND, ELIZABETH STROOP; BRET LAM BY HIS NEXT FRIEND, ELIZABETH STROOP; JAMIE STROOP BY HER NEXT FRIEND, ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCLANAHAN BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER BY HIS NEXT FRIEND, DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

OTIS R. BOWEN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES AND WILLIAM L. LUKHARD, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs hereby move this Court, under the provisions of Rule 65(b), for a Temporary Restraining Order

1. certifying conditionally the four classes of Virginia residents represented by the named-plaintiffs as outlined in plaintiffs' complaint;

2. enjoining defendants from denying, reducing or terminating plaintiffs AFDC benefits on July 1, 1986 because

of the application of the assistance unit provisions contained in 45 CFR § 206.10(a)(1)(vii)(B) and Virginia ADC Transmittal #103.

3. enjoining defendants from requiring independently supported children who reside with children on AFDC to apply for AFDC or to assign or surrender their child support to DSS.

4. enjoining defendants from assuming that the income of the independently supported children is available to other family members who receive AFDC;

5. requiring the state defendant to reevaluate all AFDC applications filed on or after June 1, 1986 and adjust eligibility determinations and benefit levels without regard to the assistance unit regulations cited above.

6. enjoining defendants from taking any further action to implement the assistance unit regulations in Virginia pending further hearings and orders by this court;

7. allowing the Temporary Restraining Order to issue without the payment of security by plaintiffs on account of plaintiffs' indigency and because significant public issues are involved in this case;

In support of this Motion, the Plaintiffs state the following:

1. Plaintiffs and the class they represent will suffer irreparable injury if the Temporary Restraining Order is not granted;

2. The harm which the plaintiffs will suffer in the absence of a Temporary Restraining Order far outweighs any harm which the defendants will suffer if the requested injunction is granted;

3. There is a very great likelihood that Plaintiffs will prevail on the merits in this action;

4. It is in the public interest to grant the requested injunction.

In further support of this Motion, Plaintiffs submit the attached affidavits and the accompanying Memorandum.

Respectfully Submitted,

KAREN B. CARTER, ET AL.
—By Counsel—

Jill A. Hanken
Cherry C. Harman
Virginia Poverty Law Center
9 W. Main Street
Richmond, VA 23220

Jamie Aliperti
Client Centered Legal Services of Southwest Virginia
P.O. Box 147
Castlewood, VA 24224

Claire E. Curry
Charlottesville-Albemarle Legal Aid Society
413 E. Market St.
Charlottesville, VA 22901

Holly Peters
Legal Aid Society of the Roanoke Valley
312 Church Ave. S.W.
Roanoke, VA 24016

Counsel for Plaintiffs

By: JILL A. HANKEN

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No:

KAREN B. CARTER, ET AL.

v.

OTIS BOWEN, ET AL.

I, ELIZABETH S. STROOP, being duly sworn, depose and say as follows:

1. I am a resident of the City of Harrisonburg, Virginia, living at 2531-C Mosby Court, Harrisonburg, Virginia.

2. My family consists of myself and my children: my daughter Melissa, who is age 13; my son Brett, who is age 10; and my daughter Jamie, who is age 3.

3. Each month, Jamie and I receive ADC benefits which total Two Hundred Thirty-one Dollars ($231), and up to Fifty Dollars ($50) of the support which my ex-husband, Jamie's father, pays to the State. Melissa and Brett receive a total of Six Hundred Thirty-eight Dollars ($638) in dependents' benefits from Social Security because their father, my first husband, is disabled.

4. I am the Representative Payee for Melissa's and Brett's Social Security income. Social Security has made it very clear to me that I must use this money only for Melissa's and Brett's benefit. I budget carefully and keep receipts to show that I am following this rule. I understand

that I can be fined or imprisoned if I break this rule. Likewise, the ADC benefit and the support is for Jamie's and my needs.

5. I use the Social Security money to pay the rent, because before receiving that money we did not have to pay rent. (I reside in a federally-subsidized housing project where my monthly rent varies according to my monthly income.) I also use the Social Security money to pay Melissa's and Brett's part of the phone bill, to pay for their clothes, medical needs, public transportation as we do not have a car, hair cuts, some food, school needs, etc. I try to divide the expense of the type of household items which are shared by the family such as soap or shampoo. I use Jamie and my ADC check to pay for the utilities, my part of the phone bill, clothes, some food, etc. (Attached is an average budget.)

6. I find that our income often doesn't meet our expenses. Our food stamps only cover about 16% of our grocery bill. I have been trying to save some money from the ADC check for some dental work I need badly as this is causing sinus infections, and I will lose teeth. (I have lost some teeth already because of the delay.) However, Melissa may need glasses which will have to come from the money I've set aside for my dental work. We need some new chairs as our chairs are bursting, but we haven't been able to afford any furniture. Jamie wants a tricycle so she can ride outside with the other children, but we can't afford one. I have learned that as the children get older, they need more things, and the things they need are more expensive, not just toys but things such as personal items, clothes, school supplies, school related expenses. I worry about our increasing expenses alot because I have talked with children Melissa's age who have already dropped out of school because they did not have the clothes they needed for school and they were uncomfortable and embarrassed

since, for example, the other teenagers called them names or made fun of them.

7. The Department of Social Services has told me that Jamie and my ADC check will stop in July. My worker there said this is because she has to count Melissa's and Brett's Social Security money as available to everyone including Jamie and myself. I didn't know whether to believe this or not at first. Now I am confused, upset, and afraid. Melissa and Brett are very frightened because they think they might have to leave, even though I have tried to assure them they can stay with me. I understand from Social Security that I cannot use the Social Security money for myself or Jamie because it is against the law, and I could be punished if I do. I don't want to be forced to send Melissa and Brett to their disabled father who is unable to take care of them and has not had anything to do with them for years. On the other hand, I don't know how I will meet the needs of my family and myself.

8. I have tried to make a budget without Jamie and my ADC money. I think Jamie's father is supposed to pay about Twenty-Five Dollars ($25) per week in child support to the State. I may be able to meet Jamie's needs with that money for now, as she is very small, but she will start school in a year or so, and I'm afraid I can't meet increased expenses. Melissa and Brett will have to do without more things such as some clothes, food, or school related activities. I don't know what I will do if anyone else needs glasses or dental work, or any other irregular or unexpected expenses occur. I have been unable to buy the clothing or shoes that I have needed for quite some time, and now there will also be no money for some food or personal items for myself.

9. I feel I have no other options for assistance as the children do not have grandparents who might be able to help us. I am limited in my ability to obtain any earned

income by my family responsibilities such as taking care of my three year old, and because of an injury I received on my job as a housekeeper about five years ago. A heavy window fell on my right hand and crushed it. (I am right handed.) I lost 75% of the grip in my hand. The doctor told me it will not get better, and it may get worse. I tried to keep working after my injury but had difficulty due to the heavy nature of housekeeping as a profession. I do not possess any other marketable skills as far as I know. I am also worried now, because I have used my left arm and hand more since the injury and I may have overdone it. I get swelling in that arm sometimes so that I can hardly lift my left arm to brush my hair.

/s/ Elizabeth S. Stroop
ELIZABETH S. STROOP

STATE OF VIRGINIA

COUNTY OF ROCKINGHAM, to-wit

I, Phyllis B. Tyson, a Notary Public in and for the County of Rockingham, Virginia, do certify that the foregoing Affidavit by Elizabeth S. Stroop was sworn to before me on this 16th day of June, 1986.

My Commission expires on 11th day of October, 1988.

/s/ Phyllis B. Tyson
Notary Public

STROOP FAMILY BUDGET

Average Income and Expenses

INCOME

Social Security Dependents' Benefits	$ 638.00
ADC Benefits	231.00
Support Paid to State	50.000
Food Stamps	86.00
Total	$1,005.00

EXPENSES

	Average Monthly Expenses	Melissa's & Brett's Expenses, Pro-Rata Share of Joint Exp.
Rent	$ 107.00	$107.00
Groceries	540.00	227.00
Electricity	70.00	35.00
Clothes (for Melissa and Brett)	80.00	80.00
Telephone	17.00	9.00
Transportation (cabs and buses)	60.00	30.00
Pharmacy (nonprescription medicine, vitamins, bandages, etc.)	30.00	20.00
Medical (Such as appointment with Doctor)	20.00	20.00
Personal/Household Items (such as haircuts, soap, shampoo, detergents, tissues, etc.)	50.00	25.00
Spending Money for Melissa and Brett (for birthday parties, skating, movies, toys for Brett, a pocketbook for Melissa, etc.)	50.00	50.00
School Trips (Brett & Melissa) and Meals Out (on the school trips with Jamie and I)	50.00	35.00
Total	$1,074.00	$638.00

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No:

KAREN B. CARTER, ET AL.

v.

OTIS BOWEN, ET AL.

AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER

DAVID LEE JONES, the undersigned below, being duly sworn accordingly to law, deposes and says:

1. I am an adult citizen of the City of Roanoke, who resides at Route 8, 4749 Wood Road, Roanoke, Virginia 24014.

2. I am the father of Cory Paul Jones, age 5, and the former husband of Paula Jones.

3. Paula Jones and I were divorced in March, 1981. We separated in February, 1980. Paula Jones has had custody of Cory since his birth in July, 1980.

4. I have a son, Christopher Lee Jones, from my first marriage. Chris lives with me and I am fully responsible for his support.

5. Following our separation, Paula began to receive Aid to Dependent Children (ADC). In November, 1980, the Division of Child Support Enforcement (DCSE) issued an administrative order establishing my child support obligation at $24.47 per week. I agreed to a voluntary wage

assignment. The amount was increased to $36 per week in May, 1982.

6. In September, 1983, Paula's ADC caseworker suggested that Cory would receive more support if he were excluded from the grant. Cory was excluded from the assistance unit and I agreed voluntarily to pay Paula $155 per month as long as I was working full time. When my hours are cut back we agreed that I'll pay her $112 per month.

7. Since the separation, I have faithfully supported my son by paying child support either to the Division of Child Support Enforcement or directly to Paula Jones. In addition to the $112 to $155 paid monthly to Paula, I contribute to my child's support every weekend when he visits. I have purchased clothing, books, and toys for him and take him on outings. I spend approximately $40 per weekly visit. I also pay $8 per month on Cory's share of the group health insurance plan.

8. My children are very important to me. Paula and I keep each other informed on what is happening to Cory. Paula and I have tried to work out custody, visitation support issues in a calm, practical way. I come from a broken home and I do not want Cory to deal with some of the problems I faced.

9. Because Paula believes in cooperating with me in raising our son, as soon as she received the sibling deeming notice from the Department of Social Services (DSS) she contacted me. Currently, Paula and her son Eric Andrew Byrd receive ADC, but Cory is excluded because I am providing child support and health insurance. According to the notice, Cory must be added to the ADC assistance unit as of July 1, 1986. This means that Cory will not receive the money I am paying for his support. All of the money I pay except for $50 will go to the State of Virginia as reimbursement for ADC funds paid to support Paula, Cory and Eric.

10. I want to support my own child. I don't want my wages to be used by the state to support a child who is not mine. My son shouldn't be penalized because he has a poorer half-sibling. I don't want my son to receive welfare again. I have worked hard to make sure he and Christopher would stay off ADC and now he is being forced to receive it. I was never consulted about this nor have I received any formal notice of the change.

11. If my son is going to be forced to receive ADC, and my money will be used to finance the ADC program, I see no reason for me to keep paying child support. If Cory is forced into the ADC unit then DCSE can get another administrative order making me pay even more money to the state.

12. If this matter cannot be resolved, I will petition for custody so Cory can live with me. If this unjust rule is enforced, I see no other way to end this unfair treatment.

/s/ David Lee Jones
DAVID LEE JONES

STATE OF VIRGINIA *
*
CITY OF ROANOKE *

The foregoing instrument was acknowledged before me on June 16th, 1986.

/s/ Linda H. Casper
Notary Public

My commission expires: 10/27/89

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No:

KAREN B. CARTER, ET AL.

v.

OTIS BOWEN, ET AL.

AFFIDAVIT IN SUPPORT OF TEMPORARY RESTRAINING ORDER

PAULA JONES, the undersigned below being duly sworn according to law, deposes and says:

1. I am an adult citizen of the City of Roanoke who resides at 736 Murray Avenue, S.E., Roanoke, Virginia 24013.

2. I am the mother of Cory Paul Jones, age 5, and the former wife of David Lee Jones. I have another son, Eric Andrew Byrd, age 9.

3. We were divorced in March, 1981. I have had custody of Cory since his birth in July, 1980. I was pregnat with Cory when we separated.

4. I have been on Aid to Dependent Children (ADC) since 1980. I have been unable to work outside the home because I have had to care for my two children and my invalid mother who has diabetes and is almost blind.

5. Both Eric and Cory were on the ADC grant until September, 1983. At that time I followed my ADC caseworker's suggestion and removed Cory from the

grant. That way, Cory would receive more support. I now receive $231 a month from ADC and on the average of $133 each month in child support directly from David. David provides health insurance for Cory through a group plan through his employer. He also keeps toys and clothing at his home for Cory to use during his weekend visits.

6. I live with my mother who receives Social Security. We share household expenses. I have been very careful to keep my ADC money separate from Cory's money. I keep the money in different envelopes in my purse.

7. My average household expenses for Eric and myself are as follows:

Utilities and phone	$ 80
Transportation	20
Food	70
Clothing	40
Miscellaneous	21
	$231

Cory's average monthly expenses are as follows:

Utilities and phone	$ 40
Transportation	10
Food	35
Clothing	20
School (snacks)	20
Miscellaneous	8
	$133

My mother pays our rent of $150 per month.

8. Earlier this month I received a notice from the Department of Social Services (DDS) that Cory will have to be included in the ADC assistance unit beginning July 1, 1986. When this happens, my ADC check will only be increased by $60. Cory will not receive all the support that his father pays. He will only receive the first $50 paid each month. The rest will go to the State of Virginia.

9. I don't want Cory to suffer because I have another son who receives ADC. I think it's unfair for the state to take Cory's money away from him. I also think it's unfair for the state to force Cory to receive ADC when his father is providing support and helping me raise Cory.

10. I don't know how we are going to live on less income. I will not be able to afford school supplies and fees for the children. We only purchase necessities now. We do not own a car, and we don't smoke or drink.

11. Cory's father and I had been getting along very well until the ADC dispute came up. I am afraid this will create problems between us because David hates the idea of his child being on welfare. I don't want Cory to be subjected to conflicts between his parents. I am afraid David will file for custody and I'll lose Cory.

/s/ Paula Jones
PAULA JONES

STATE OF VIRGINIA *
*
CITY OF ROANOKE *

The foregoing instrument was acknowledged before me on June 17, 1986.

/s/ Clarence I. Mitchell
Notary Public

My commission expires: 12/11/87

AFFIDAVIT OF DOROTHY BROWN

I, Dorothy Brown, being duly sworn, states the following:

1. I am forty-nine years old and reside in Norfolk, Virginia, with my sons, Robert Lee Turner, age eleven, and Kervin Brown, age six;

2. I am the sole caretaker of said children and my total income to support the children consists of $712.00 per month;

3. I am the representative payee for my son, Robert Lee Turner, who receives $457.00 monthly Social Security Survivors benefits on his father's earnings record, that I receive $231.00 monthly Aid to Families with Depend[e]nt Children (ADC) for my son, Kervin Brown, and that I receive $24.00 in food stamps;

4. I was notified by letter dated June 4, 1986, from the Department of Social Services that my ADC check will be terminated effective July 1, 1986, because my son, Robert Lee Turner, must be included in the Assistance Unit. His income from Social Security for May 1986, must be counted and, therefore, my total income is too high to receive ADC. This proposed termination presents an extreme hardship and dilemma for me;

5. I cannot support myself and my children on a sole income of $457.00 monthly Social Security Survivors Benefits. Without my $231.00 ADC check, I must now provide for all necessities and expenses previously paid by ADC with my son's Social Security check. Not only does the $457.00 social security check not cover my necessities and expenses, but I was told by a claims representative of the Social Security Administration that I am subject to criminal prosecution for using these funds for anyone else other than my son, Robert. I must visit the Social Security office once a year and make a report, showing that I spent

the money for my son, Robert, and no one else. I was further told that I must use this money for the needs of Robert and not the overall benefit of the family;

6. Previously to the proposed action of termination of my ADC check, my total income was insufficient to cover all of my needs. I have to borrow money from friends at the end of each month. Without my ADC check, I do not know how I am going to survive and meet my needs;

7. My total monthly household expenses amount to about $718.00;

8. My rent is $173.00 per month and I have had, at least, three warrants in the last year for paying my rent late.

9. As representative payee for Robert's social security check of $457.00, I deduct $113.00 for Robert's share of the rent (25% of his income). The other monthly expenses paid for out of this money, include the following:

a. I must pay $60.00 monthly for Robert's medication which include a spray mist inhaler, theo-dur tablets, and allergy injections. He suffers with chronic asthma;

b. I do not own an automobile and I have to pay $30.00 monthly for public transportation and car fare to friends who transport me to take care of my affairs. Because my son, Robert, has chronic asthma, I must take him on weekly visits to the doctor to get allergy injections;

c. I incur excess utility costs because I use the air conditioner as a humidifier to help Robert's asthma condition. Therefore, I deduct $15.00 for Robert's share of excess utility costs.

d. I pay $25.00 monthly to the City of Norfolk for ambulance service rendered to my son, Robert. My balance owing is $300.00, which I have incurred over the last year;

e. I pay $25.00 monthly to Norfolk General Hospital for emergency treatment rendered to Robert in the last year. My balance is about $800.00. His condition is worse in the summer and I have had to take him to the emergency room everyday to receive oxygen and other treatment from May 1985 through August 1985;

f. I spend $50.00 monthly on Robert's clothes. He is a large child and his clothes are, therefore, expensive. He is growing and wears through his clothes very quickly;

g. Other monthly expenses for Robert include: $100.00 for food, $30.00 for school expenses, and $15.00 for toiletries and haircuts;

10. I have neglected my own medical needs. The health department has recommended that I obtain dental work and has recommended that I get eyeglasses. These items are not covered by my medicaid and I have had no money to fulfill these needs;

11. Out of my ADC monthly check of $231.00, I pay for the following expenses: $60.00—rent, $130.00—food, $30.00—clothing for myself and my son, Kervin, $30.00—transportation, $15.00—telephone bill; and

12. Should the proposed action to terminate my ADC assistance be upheld, I fear that I will not be able to continue providing for the medical needs of my child, Robert, who is without medical insurance, that I will eventually be evicted from public housing if I receive any further warrants, and that I may be criminally prosecuted for misusing social security funds. This money is the only income I have to survive.

/s/ Dorothy Brown
DOROTHY BROWN

STATE OF VIRGINIA
CITY OF NORFOLK, to-wit:

The affiant, Dorothy Brown, in the foregoing affidavit, having been duly sworn, states that the facts and allegations contained therein are true.

/s/ Gail P. Staton
Notary Public

My commission expires:
October 4, 1988

[SEAL]

AFFIDAVIT OF GENEVA POWERS

I, GENEVA POWERS, being first duly sworn, do depose and state as follows:

1. I am a citizen and resident of the United States residing at 1533 Iron Street, Richlands, Virginia 24641, in Tazewell County. I live in a trailer with my three daughters. Nancy, age 14 and Loretta, age 16 are my daughters by my ex-husband, Roy Powers. Crystal, age 9, is my daughter by Ralph McClanahan, deceased. Mr. Powers and I divorced in 1973.

2. I am currently receiving Aid to Dependent Children benefits (ADC) for Nancy and Loretta in the amount of $207.00 per month from the Tazewell County Department of Social Services. I am representative payee for Crystal's $254.00 per month Title II Social Security check which she draws from her deceased father's earnings. I also receive $336.00 per month in SSI benefits for my nervous condition. Once in a great while I will receive a $50.00 ADC disregard check when my ex-husband decides to make a payment to the Welfare. I feel he should be made to do more to support our kids; I am just barely making ends meet.

3. As best as I am able to come up with, my average monthly expenses for my family are as follows:

Rent	$100.00
Electric	$110.00
Food (in addition to Food Stamps)	$350.00
Clothing	$ 60.00
Medical	$ 10.00
School supplies	$ 30.00
Transportation	$ 30.00
Non-food groceries/supplies	$ 50.00
Eyeglass payment (self)	$ 10.00
Vacuum cleaner payment	$ 22.14
Furniture payment	$ 25.00

Exercise bike (for Crystal)	$ 6.00
Recreation	$ 50.00
TOTAL	$853.14

4. In order to be Crystal's representative payee, I had to promise Social Security that I would spend her check only for her. They told me I could make purchases that benefited other household members too, so long as Crystal also benefited. I am required to certify annually with Social Security that I am spending Crystal's check correctly. To the best of my knowledge, my average monthly expenses for Crystal are as follows:

Portion of rent	$ 25.00
Portion of electricity	$ 27.50
Portion of food	$100.00
Portion of clothing	$ 30.00
Portion of school supplies	$ 10.00
Portion of transportation	$ 7.50
Portion of household items	$ 12.50
Portion of vacuum payment	$ 5.50
Portion of furniture payment	$ 6.25
Exercise bicycle	$ 6.00
Portion of recreation	$ 16.00
Medical (not on Medicaid)	$ 10.00
TOTAL	$256.25

5. In April of this year I was told by my ADC worker, Betty Sue Pruett, that I would have to add Crystal to my ADC Assistance Unit. She said it was a new law, and that my ADC benefits would go down from $207.00 to $11.00 per month. She said that the Department would consider Crystal's check to be available to the rest of my household. I told her that as Crystal's representative payee I had to spend Crystal's check just for Crystal, but she said that was the new law and there was nothing she could do about it.

6. On June 10, 1986 I received an Advanced Notice of Proposed Action from the Tazewell County Department of Social Services officially informing me of the cut in my ADC. The Notice said that the cut would take effect on July 1, 1986.

7. If my ADC is cut, I just don't know what I will do. I don't have enough money to pay my bills as it is. I would have to use Crystal's money for Nancy and Loretta too; I couldn't support the two of them on just $11.00 a month plus my SSI check. But I am afraid that if I use Crystal's money for them, I could go to jail for Social Security fraud. I don't understand why the government is telling me to do two different things at once, or how they expect me to make ends meet if they cut my monthly income by $196.00. This situation has made my nerves much worse so that I cannot sleep at night. I won't have the money to pay for utilities, clothing, medicine, transportation, and other basic necessities of life for my family.

8. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on June 13, 1986.

/s/ Geneva Powers
GENEVA POWERS

Notarization omitted pursuant to 28 U.S.C. § 1746.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 86-0398-R

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND, KAREN B. CARTER; PAULA JONES; CORY P. JONES BY HIS NEXT FRIEND, PAULA JONES; DAVID L. JONES; ELIZABETH STROOP; MELISSA LAM BY HER NEXT FRIEND, ELIZABETH STROOP; BRET LAM BY HIS NEXT FRIEND, ELIZABETH STROOP; JAMIE STROOP BY HER NEXT FRIEND, ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCLANAHAN BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER BY HIS NEXT FRIEND, DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

OTIS R. BOWEN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES AND WILLIAM L. LUKHARD, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS

[FILED June 23, 1986]

TEMPORARY RESTRAINING ORDER

THIS MATTER comes before the court on plaintiffs' motion for a Temporary Restraining Order and for Conditional Class Certification. The court has reviewed the material submitted by the parties and heard the arguments of counsel this day. Being fully advised, the court finds and rules as follows:

1. Plaintiffs will lose a significant portion of their subsistence income support and will thereby suffer irreparable injury if the Temporary Restraining Order is not granted;

2. The harm which the plaintiffs will suffer in the absence of a Temporary Restraining Order far outweighs any harm which the defendants will suffer if the requested injunction is granted;

3. There is a very great likelihood that Plaintiffs will prevail on the merits in this action;

4. It is in the public interest to grant the requested injunction.

IT IS NOW, THEREFORE, ORDERED AS FOLLOWS:

1. Four classes of Virginia residents represented by the named-plaintiffs as outlined in plaintiffs' complaint, are conditionally certified for the purpose of this Temporary Restraining Order;

2. Defendants are temporarily enjoined from reducing or terminating plaintiffs AFDC benefits on July 1, 1986 because of the application of the assistance unit provisions contained in 45 CFR § 206.10(a)(1)(vii)(B) and Virginia ADC Transmittal #103.

3. Defendants are temporarily enjoined from requiring independently supported children who reside with children on AFDC to apply for AFDC or to assign or surrender their child support to DSS.

4. Defendants are temporarily enjoined from assuming that the income of the independently supported children is available to other family members who receive AFDC;

5. The state defendant is directed to within 30 days reevaluate all AFDC applications filed on or after June 1, 1986 and adjust eligibility determinations and benefit levels for those applicants without regard to the assistance unit regulations cited above.

6. Defendants are temporarily enjoined from taking any further action to implement the assistance unit regulations in Virginia pending further hearing scheduled before this court on July 3, 1986, 11:00 A.M.

7. The federal defendant is enjoined from taking any action against Virginia DSS because of its compliance with the terms of this Order.

8. This Temporary Restraining Order shall issue without the payment of security by plaintiffs on account of plaintiffs' indigency and because significant public issues are involved in this case;

ENTERED this 23rd day of June, 1986.

/s/ Richard L. Williams
United States District Judge

I ask for this:

/s/ Jill A. Hanken
Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 86-0398-R

KAREN B. CARTER, ET AL., PLAINTIFFS

vs.

OTIS R. BOWEN, ET AL., DEFENDANTS

[FILED July 2, 1986]

ORDER EXTENDING TEMPORARY RESTRAINING ORDER

Upon motion of plaintiffs, Karen B. Carter, *et al.*, for an extension of the Temporary Restraining Order entered in this cause on June 23, 1986, and with the consent of counsel for defendants Bowen and Lukhard, and deeming it just and proper to do so, it is ORDERED that the Temporary Restraining Order entered in this cause on June 23, 1986, be, and the same hereby is, extended pending the outcome of this litigation or further order of this Court. The Court finds it appropriate to extend the Temporary Restraining Order for the reasons set forth in open court on June 23, 1986, as well as those additional reasons advanced in plaintiffs' motion.

Deeming it just and proper to do so, it is ORDERED that the following provision is made a part of the extended temporary restraining order:

> 9. The state defendant is directed to review all voluntary closures of AFDC cases which may have occurred due to the enforcement of the regulations now enjoined. Any such case voluntarily closed by an

> individual shall be identified, the caretaker notified of the injunction in this case and given the opportunity to reopen the AFDC case retroactive to the date of voluntary closure. This action shall be completed no later than August 1, 1986.

Let the Clerk send a copy of this order to all counsel of record.

7/2/86 /s/ Richard L. Williams
DATE United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 86-0398-R

KAREN B. CARTER, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, ET AL., DEFENDANTS

[FILED Nov. 17, 1986]

ORDER

The hearing on the motions for summary judgment heretofore scheduled for November 24, 1986 is continued until such time as the Court of Appeals for the Fourth Circuit issues its decision in *Britt v. Bowen,* No. 86-3076, consolidated with *Massinga v. Bowen,* No. 86-3083. These cases are scheduled for argument before the Fourth Circuit in January, 1987 and contain essentially the same issues presented to this Court in this matter. Counsel are directed that, within twenty-four hours after the Court of Appeals for the Fourth Circuit issues its opinion in these cases, they are to move this Court to reactivate this case and they must reschedule a hearing on the motions for summary judgment with the Court's secretary. In the interim, the Clerk is directed to put the case on inactive status and to not receive any pleadings in the case until counsel present an order requesting the case be reactivated because the Fourth Circuit has issued its opinion.

Let the Clerk send a copy of this order to all counsel of record.

Nov. 17, 1986 /s/ Richard L. Williams
DATE United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 86-0398-R

KAREN B. CARTER, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, ET AL., DEFENDANTS

[FILED Sept. 14, 1987]

PLAINTIFFS' RESPONSE TO DEFENDANT BOWEN'S MOTION TO REACTIVE THIS CASE AND STATEMENT OF REMAINING CLAIMS, AND PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF BEFORE ORAL ARGUMENT ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF.

COME NOW Plaintiffs, by counsel, and, pursuant to this Court's Order filed November 17, 1986, and in response to Defendant Bowen's Motion to reactivate this case, say as follows:

1. For the reasons stated by Defendant Bowen, Plaintiffs agree that this case should now be reactivated.

2. The U.S. Supreme Court decision in *Bowen v. Gilliard,* 55 U.S.L.W. 5079 (June 25, 1987) has addressed and disposed of several issues raised by Plaintiffs in this case.

3. Specifically, the Supreme Court held with regard to children independently supported by child support benefits that the DEFRA Amendment at issue here does not violate Fifth Amendment due process and equal protection principles nor the Fifth Amendment's takings clause.

4. Therefore, pursuant to F.R.C.P. 23(e) and 41(a) Plaintiffs will seek an order to voluntarily dismiss the statutory and constitutional claims of the children independently supported by child support payments.

5. Other issues in this case raised on behalf of children receiving Social Security benefits and absent parents paying child support are not disposed of by *Bowen v. Gilliard.* Plaintiffs intend to pursue the following claims made in their cross motion for summary judgment:

a. The Defendants' regulations violate the Social Security Act because the involuntary diversion of OASDI payments to needy siblings is contrary to the Social Security Act's Anti-Alienation Provision.

b. The regulations violate the Social Security Act's provisions governing the fiduciary duty of representative payees.

c. Defendant's regulations violate the Social Security Act and the Constitutional guarantee of Equal Protection of the laws by failing to disregard the first Fifty Dollars ($50.00) of Social Security Benefits received by a dependent child.

d. The DEFRA Amendment exacts an unconstitutional taking of the property of the absent parent paying a child support obligation without just compensation or due process of law.

6. Because plaintiffs' brief on these issues was filed one year ago and there have been new developments since that time, plaintiffs request Leave of Court to file a supplemental brief before oral argument is heard.

WHEREFORE, for the reasons stated herein, it is respectfully requested that this matter be reactivated on the Court's docket, and that Plaintiffs be granted time to file a supplemental brief on all remaining claims.

Respectfully Submitted,

KAREN B. CARTER, ET AL.
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CERTIFICATE OF SERVICE

I, Jill A. Hanken, Counsel for Plaintiffs do hereby certify that true and exact copies of the foregoing Plaintiffs' Response to Defendant Bowen's Motion to Reactivate this Case and statement of Remaining Claims, and Plaintiffs' Motion for Leave to file Supplemental Brief Before Oral Argument on Cross-Motions for summary Judgment, and Brief in Support Thereof, were mailed this 14th day of September, 1987, to:

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Supreme Court of the United States

No. 89-535

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELIZABETH STROOP, ET AL.

ORDER ALLOWING CERTIORARI
Filed January 8, 1990

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted and the parties are directed to adhere to the following briefing schedule. The brief of the petitioner must be received by the Clerk on or before February 9, 1990. The brief of the respondents must be received by the Clerk on or before March 6, 1990, and a reply brief, if any, must be received by the Clerk on or before March 16, 1990.

January 8, 1990

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No. 89-535 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELIZABETH STROOP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether Social Security child's insurance benefits, paid under 42 U.S.C. 402(d), are "child support payments" within the meaning of an Aid to Families With Dependent Children (AFDC) provision, 42 U.S.C. 602(a)(8)(A)(vi), which requires that the first $50 per month of child support payments be disregarded in determining AFDC eligibility and assistance levels.

PARTIES TO THE PROCEEDINGS

The petitioner is the Secretary of Health and Human Services. The respondents are plaintiffs Elizabeth Stroop, Melissa Lam by her next friend Elizabeth Stroop, Bret Lam by his next friend Elizabeth Stroop, Jamie Stroop by her next friend Elizabeth Stroop, Geneva Powers, Crystal McClanahan by her next friend Geneva Powers, Dorothy Brown, and Robert Lee Turner by his next friend Dorothy Brown, on behalf of themselves and all others similarly situated. The plaintiffs in the district court included Karen B. Carter, Ragene Carter by her next friend Karen B. Carter, Paula Jones, Cory P. Jones by his next friend Paula Jones, and David L. Jones, but they were neither appellants nor appellees in the court of appeals. The Commissioner of the Virginia Department of Social Services was a defendant in the district court and a separate appellee in the court of appeals; unlike the Secretary of Health and Human Services, the Commissioner was not an appellant in the court of appeals regarding the question presented in the petition for certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-535

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELIZABETH STROOP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 870 F.2d 969. The opinions of the district court (Pet. App. 14a-22a, 23a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1989. A petition for rehearing with suggestion for rehearing en banc was denied on May 31, 1989 (Pet. App. 31a-34a). On August 25, 1989, Chief Justice Rehnquist extended the time for filing a petition for writ of certiorari to September 28, 1989. The petition for a writ of certiorari was filed on that date, and was granted on January 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 402(a)(8)(A)(vi) of the Social Security Act (42 U.S.C. 602(a)(8)(A)(vi) (Supp. V 1987), as it was passed in 1984 (Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, § 2640(c), 98 Stat. 1146), provided:

> [I]n making the [AFDC eligibility and assistance] determination under paragraph (7), the State agency
>
> • • • • •
>
> (vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title).

In 1988, Congress amended this provision (Family Support Act of 1988, Pub. L. No. 100-485, § 102(a), 102 Stat. 2346). The current version (to be codified at 42 U.S.C. 602(a)(8)(A)(vi)) provides:

> [I]n making the [AFDC eligibility and assistance] determination under paragraph (7), the State agency
>
> • • • • •
>
> (vi) shall disregard the first $50 of any child support payments for such month received in that month, and the first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due, with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title).

Section 457(b)(1) of the Social Security Act (42 U.S.C. 657(b)(1) (Supp. V 1987), as it was passed in 1984 (Pub. L. No. 98-369, § 2460(b), 98 Stat. 1145), provided:

> (b) • • •
>
> The amounts collected as support by a State pursuant to a plan approved under this part during any fiscal year beginning after September 30, 1976, shall • • • be distributed as follows:
>
> (1) the first $50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;

In 1988, Congress also amended this provision (Pub. L. No. 100-485, § 102(b), 102 Stat. 2346). The current version (to be codified at 42 U.S.C. 657(b)(1)) provides:

> (b) • • •
>
> The amounts collected as support by a State pursuant to a plan approved under this part during any fiscal year beginning after September 30, 1976, shall • • • be distributed as follows:
>
> (1) of such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due, shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family such month;

Social Security Act Sections 402(a)(7)(A) and 202(d) (42 U.S.C. 602(a)(7)(A) (1982 & Supp. V 1987) and 42 U.S.C. 402(d) (1982 & Supp. V 1987)) are set forth in the appendix to the petition (at 35a, 37a-40a). HHS regulations 45 C.F.R. 232.20(a) and (d) and 302.51(b)(1) are also set forth in the appendix to the petition (at 40a-41a).

STATEMENT

This case concerns the scope of the $50 per month disregard for "child support payments" that Congress has required in

eligibility and assistance determinations under the AFDC program.

A. The Statutory Framework

1. The AFDC program, set forth in Title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), is a product of "cooperative federalism" (*King* v. *Smith*, 392 U.S. 309, 316 (1968)) by federal and state governments to provide financial and other assistance on behalf of certain dependent children. For purposes of the AFDC program, a "dependent child" is a needy child who has been deprived of parental care or support by a parent's death, incapacity, or continued absence from the home (42 U.S.C. 606(a)); a "dependent child" may also be a needy child who has been deprived of parental care or support by the unemployment of the parent who is the principal wage earner (42 U.S.C. 607(a)).

State participation in the AFDC program is not mandatory, but participating States must follow all applicable federal requirements. The program "is financed in large measure by the Federal Government on a matching-fund basis, and participating States must submit AFDC plans in conformity with the Act and the regulations promulgated thereunder" (*Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974)) by the Secretary of Health and Human Services (HHS). States administer the program and determine the standard of need and level of benefits. *Heckler* v. *Turner*, 470 U.S. 184, 189 n.3 (1985). Among the federal requirements are statutory provisions directing the States to consider all income and resources available to the recipient family before determining the need-based amount of AFDC assistance (42 U.S.C. 602(a)(7) (1982 & Supp. V 1987)), and provisions specifying various categories of income and resources that are to be "disregard[ed]" in making the determination of an applicant's eligibility and assistance level (42 U.S.C. 602(a)(8) (Supp. V 1987)).

2. Social Security payments known as "child's insurance benefits" are provided as part of the Old Age, Survivors and Disability Insurance (OASDI) program, set forth in Title II of

the Social Security Act (42 U.S.C. 401 *et seq.*). Child's insurance benefits are available to children if a child's parent was an insured wage earner under the Social Security Act and the insured wage earner has died, become disabled, or retired. 42 U.S.C. 402(d) (1982 & Supp. V 1987). The benefits are paid entirely by the federal government. The largest category of current recipients of child's insurance benefits is children of deceased parents; more than 1.8 million of the almost 3.2 million children receiving child's insurance benefits in 1988 received the payments because an insured parent had died.[1]

Child's insurance benefits were initially added to the Social Security Act in 1939, when benefits for wives, widows, and parents of insured wage earners were also added. Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1364-1366. The addition of these secondary beneficiaries was designed to protect the dependents of an insured wage earner against the hardship of a loss of the insured's earnings. "The entitlement of any secondary beneficiary is predicated on his or her relationship to a contributing wage earner. If the statutory requirements for eligibility are met, the amount of the benefit is unrelated to the actual need of the beneficiary." *Califano* v. *Jobst*, 434 U.S. 47, 52 (1977). The statutory requirements of eligibility represent congressional determinations about likely dependency on the insured wage earner (*Califano* v. *Goldfarb*, 430 U.S. 199, 213-214 (1977) (plurality opinion)); the child's insurance benefits provision therefore sets forth various criteria for defining and "deem[ing]" a child's dependency on the insured wage earner. See, *e.g.*, 42 U.S.C. 402(d) (1), (3) and (4).

Child's insurance benefits under Title II are often payable to children who are also members of an AFDC household, including households headed by someone other than the insured parent. Such benefits, moreover, are frequently paid to the head

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[1] Staff of House Comm. on Ways and Means, 101st Cong., 1st Sess., WMCP: 101-4, *Background Material and Data on Programs Within The Jurisdiction of The Committee On Ways and Means* 4 (Comm. Print 1989). Of the remaining 1.395 million recipients, 963,000 received child's insurance benefits because an insured parent was disabled, and 432,000 received child's insurance benefits because an insured parent was retired. *Ibid.*

of the AFDC household as the representative payee of the child receiving child's insurance benefits. 42 U.S.C. 405(j) (Supp. V 1987).

B. The DEFRA Amendments

In 1984, Congress enacted the Deficit Reduction Act of 1984, (DEFRA), Pub. L. No. 98-369, 98 Stat. 494, a massive statute filling over 700 pages of the statutes at large and including two major divisions, the Tax Reform Act of 1984 and the Spending Reduction Act of 1984. See *Bowen* v. *Gilliard*, 483 U.S. 587, 589 n.2 (1987). As part of its spending reduction provisions, DEFRA enacted several amendments to the AFDC program. Three such amendments were included in Section 2640—the family income requirement (Section 2640(a)), the pass-through provision (Section 2640(b)), and the child support disregard (Section 2640(c)). The family income requirement provided that, in making AFDC eligibility and assistance determinations, the income of a sibling or parent living in the same household should generally be included as part of the AFDC applicant family's income, subject to specified exceptions (98 Stat. 1145; 42 U.S.C. 602(a)(38) (Supp. III 1985); before that amendment, the applicant family had been able to exclude various family members from the application (and thus exclude any of the family member's income or resources). The pass-through provision specified that the first $50 per month of support payments received by the State from noncustodial parents should be passed on directly to the AFDC recipient. 98 Stat. 1145-1146; 42 U.S.C. 657(b)(1) (Supp. V 1987). The child support disregard—the provision at issue in this case—provided that the first $50 of "any child support payments," including the payments passed on to the family under the pass-through provision, should be excluded from AFDC eligibility and assistance determinations. 98 Stat. 1146; 42 U.S.C. 608(a)(8)(A)(vi) (Supp. V 1987).

The Secretary of HHS promptly promulgated regulations and provided interpretive instructions to implement various DEFRA

changes in the AFDC program. 49 Fed. Reg. 35,586-35,606 (1984). To implement the $50 per month pass-through and disregard for child support payments, the Secretary issued regulations requiring that $50 per month of child support payments received by the State from absent parents be passed through and disregarded in eligibility determinations. 49 Fed. Reg. 35,589-35,590, 35,599, 35,605-35,606 (1984); 45 C.F.R. 232.20(a) (Pet. App. 40a); 45 C.F.R. 302.51(b)(1) (Pet. App. 40a-41a).[2] The Secretary also provided that two other types of parental child support payments should receive the child support disregard—payments received directly by the family despite the assignment to the State (49 Fed. Reg. 35,590 (1984); see also 50 Fed. Reg. 34,693-34,697 (1985); 53 Fed. Reg. 21,643 (1988)) and voluntary support payments on behalf of children for whom an assignment had been made (49 Fed. Reg. 35,590 (1984); see also 53 Fed. Reg. 21,644 (1988)). However, the Secretary did not extend the $50 per month disregard to any non-parental payments, including Social Security child's insurance benefits.[3]

C. The Proceedings In This Case

1. On June 23, 1986, respondents filed a class action against the Secretary of Health and Human Services and the Commissioner of the Virginia Department of Social Services.[4] The named plaintiffs consisted of five families in which at least one child received AFDC benefits and at least one sibling received either child support payments from a noncustodial parent or child's insurance benefits—income which had been excluded

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[2] 45 C.F.R. 232.20(a) miscites 45 C.F.R. 302.51(b)(1) as 45 C.F.R. 305.51(b)(1).

[3] The Secretary has determined that an absent parent's spousal support payments are entitled to the disregard if the absent parent's support obligations to the child and the spouse have been established, if the child and the spouse live in the same household, and if child support is being collected along with the spousal support. See 53 Fed. Reg. 21,642 (1988); 50 Fed. Reg. 19,620, 19,642 (1985).

[4] Although the Commissioner of the Virginia Department of Social Services is a respondent (Sup. Ct. R. 12.4), references in this brief to "respondents" refer to the plaintiffs.

from the AFDC eligibility and assistance determinations before the enactment of the family income requirement. Respondents challenged the family income requirement as unconstitutional and contrary to various Social Security Act provisions. J.A. 18-35.[5] After this Court's decision in *Bowen* v. *Gilliard*, 483 U.S. 587 (1987), which rejected constitutional challenges to the family income requirement in a case involving child support payments from absent parents, respondents pursued claims that the inclusion of siblings receiving Social Security child's insurance benefits in the family filing unit, and the inclusion of such benefits as income, violated provisions of the Social Security Act. Alternatively, they argued that, if the siblings were included in the family filing unit and their child's insurance benefits were included as income, exclusion of the benefits from the child support disregard violated both the Social Security Act and equal protection. J.A. 64-65; Pet. App. 17a-18a.[6]

2. On December 21, 1987, the district court (Pet. App. 14a) upheld the Secretary's inclusion of siblings receiving child's insurance benefits in the family filing unit, and the inclusion of such benefits as income under the family income requirement. *Id.* at 17a-19a. The court went on to hold, however, that, contrary to the Secretary's interpretation, the $50 per month disregard for child support payments must apply to child's insurance benefits. The court concluded that "[i]t is contradictory to treat Social Security benefits like child support for the purpose of including them in family income and then in another part of the same statute treat them differently from child support payments for the purpose of excluding a family from a potential $50 rebate." *Id.* at 19a-20a. Recognizing that the Secretary's interpretation was due "considerable deference," the court nevertheless found the Secretary's interpretation to be " 'demonstrably irrational.' " *Id.* at 18a (quoting *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980)).[7]

3. The court of appeals (Pet. App. 1a) affirmed. It upheld the Secretary's inclusion of siblings receiving child's insurance benefits in the family filing unit (and the inclusion of the benefits as income), but rejected the Secretary's determination that the $50 per month disregard for child support payments does not include child's insurance benefits (*id.* at 8a-13a). The court stated that it "perceive[d] no distinction between support derived directly from a father's wages and support provided indirectly through Title II payments" (*id.* at 11a). The court also rejected the government's contention that limiting the disregard to payments from absent parents was consistent with a primary purpose of the disregard, as reflected in the purpose of a prior child support payment disregard adopted in 1974, of providing an incentive for cooperation by custodial parents and encouraging payments from absent parents (*id.* at 9a). The court observed that the intent of one Congress could not be inferred from another Congress, and that the AFDC context had changed so much since 1974 that the objective of the prior child support disregard was no longer applicable. The court also stated that according to *Bowen* v. *Gilliard*, the disregard had a different purpose—mitigating the hardship of the family income requirement—and that this purpose was equally applicable to child's insurance benefits. Pet. App. 9a-10a.

The court of appeals acknowledged that its decision with respect to the disregard conflicted with the Eighth Circuit's decision in *Todd* v. *Norman* 840 F.2d 608 (1988), which had upheld the Secretary's interpretation. See Pet. App. 11a. Although recognizing that the Eighth Circuit had emphasized the congres-

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[5] On June 23, 1986 the district court entered a temporary restraining order enjoining the defendants from implementing the family income requirement in Virginia and conditionally certifying the class (J.A. 57-59); on July 2, 1986, the court extended the temporary restraining order for the duration of the litigation (J.A. 60-61); and, on November 17, 1986, the court placed the case on inactive status pending the outcome of relevant cases in the Fourth Circuit (J.A. 62).

[6] In light of *Bowen* v. *Gilliard*, respondents voluntarily dismissed their statutory and constitutional claims regarding the inclusion, in the family filing unit, of siblings receiving child support payments from absent parents. Pet. App. 14a, 28a.

[7] On March 4, 1988, the court issued an opinion denying the Secretary's motion to alter or amend the court's decision concerning the scope of the $50 per month disregard for the child support payments. Pet. App. 23a.

sional distinction between Social Security benefits and child support payments, the court found this distinction "too tenuous to support the Secretary's interpretation." *Ibid.* Noting that several States, including Virginia, allow child's insurance benefits to satisfy child support obligations, the court emphasized that child's insurance benefits and parental child support are similar because both are derived from the parent's earnings. *Id.* at 11a-12a. Finally, the court indicated that the Secretary's "unreasoned distinction raises equal protection concerns" and suggested that rejection of the Secretary's interpretation avoided doubts about its constitutionality. *Id.* at 12a.[8]

SUMMARY OF ARGUMENT

The child support disregard applies to payments from absent parents and does not include Social Security child's insurance benefits.

The term "child support" in the Social Security Act consistenly refers to payments from absent parents. "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (internal quotation marks omitted). In contrast to the repeated use of "child support" to refer to parental payments, the Social Security Act does not use "child support" to refer to child's insurance benefits, or to any other kind of Social Security benefits. As a result of a 1988 amendment, the disregard now refers explicitly to payments by an "absent parent" and contains no indication that it is intended to have a broader scope. Both in 1984 and 1988, moreover, the disregard was enacted with a companion pass-through provision, which clearly concerns payments from absent parents.

The legislative background and history of the disregard also support the conclusion that it applies to payments from absent

[8] Although the government submitted a post-argument memorandum concerning the 1988 amendment of the disregard provision (see p. 2, *supra*), and contended that this amendment supported the Secretary's position, the court of appeals failed to discuss, or even acknowledge, the 1988 change.

parents and not to Social Security benefits. The problem of obtaining child support payments from absent parents has long been a central concern of the AFDC program. In 1974, Congress enacted the only prior child support disregard, and the legislative history stated explicitly that it was intended to produce cooperation by the custodial parent and payments from the absent parent. It is thus reasonable to conclude that the 1984 child support disregard was intended to serve the same purpose. The legislative history of the DEFRA amendments, moreover, distinguishes between child support payments and Social Security benefits as two different sources of income.

To the extent that the statute is ambiguous, the Secretary's interpretation is entitled to deference. The Secretary has reasonably concluded that the disregard should be applied to payments from absent parents and not to other payments, and that one aspect of the disregard is to encourage payments from absent parents and cooperation from custodial parents. The court of appeals rejected the Secretary's interpretation because, in its view, mitigation of hardship was the sole purpose of the disregard, child's insurance benefits are like child support payments because both are derived from a parent's earnings, and some States permit child's insurance benefits to satisfy child support obligations. Each of these reasons is flawed, and none justifies overriding the Secretary's interpretation. The mitigation-of-hardship rationale reflects a misreading of *Bowen* v. *Gilliard* and an incorrect rejection of the relevance of the only prior child support disregard. The similarity-of-payments rationale ignores important differences between child support and child's insurance benefits, including the fact that child's insurance benefits are guaranteed by the federal government. The state-law rationale similarly ignores the fact that child's insurance benefits are provided in many situations in which there is no outstanding child support obligation at all (for instance, when the insured wage earner is deceased), and that, in any event, state law treatment of child's insurance benefits varies widely.

Interpreting the child support disregard to apply to payments from absent parents and not to Social Security benefits raises no

constitutional problems. This kind of "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Bowen* v. *Gilliard*, 483 U.S. at 601 (internal quotations omitted). The incentive rationale for child support payments supplies a ready basis for justifying the distinction between parental child support payments which are paid (or not paid, as is too often the case) by absent parents and child's insurance benefits, which are paid and guaranteed by the federal government.

ARGUMENT

THE AFDC DISREGARD FOR "CHILD SUPPORT PAYMENTS" DOES NOT APPLY TO SOCIAL SECURITY CHILD'S INSURANCE BENEFITS

This case concerns the meaning of the term "child support payments" in the AFDC disregard provision, which, as passed in 1984, required state agencies to "disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under [42 U.S.C. 657(b)]." 42 U.S.C. 602(a)(8)(A)(vi) (Supp. V 1987). The question presented is whether, as the Secretary has determined, "child support payments" refers to payments from absent parents and does not include Social Security child's insurance benefits, or whether, as respondents contend and the court of appeals concluded, the term also includes Social Security child's insurance benefits.

The Secretary's determination that the disregard for "child support payments" does not include Social Security child's insurance benefits is supported by the general use and meaning of the term "child support" in the Social Security Act, and by the language and legislative history of the disregard provision. Contrary to the court of appeals' suggestion, moreover, there is nothing unreasonable about the Secretary's administrative interpretation, nor does this interpretaion pose any constitutional problem. The Secretary's common sense construction of "child support payments" should therefore be upheld.

A. As Used In The Social Security Act, The Term "Child Support" Does Not Include Social Security Payments

The Social Security Act reflects a pervasive distinction between "child support payments"—which refer to parental payments—and other types of income and resources, including child's insurance benefits.[9] "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (internal quotation marks omitted). This Court has found that rule fully applicable to the AFDC statute. See *King* v. *Smith*, 392 U.S. 309, 330 (1968) ("Our interpretation of the term 'parent' in § 406(a) is strongly supported by the way the term is used in other sections of the Act."). Given that "a legislative body generally uses a particular word with a consistent meaning in a given context" (*Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972)), the uniform use of the term "child support payments" to refer to parental payments is powerful evidence of the meaning of the term in the disregard provision.

1. The term "child support payments" figures prominently in Title IV of the Social Security Act, and invariably refers to payments from absent parents. This statutory usage was clear at the time Congress enacted DEFRA. The 1982 version of Title IV (42 U.S.C. 601-676) contains more than twenty references to "child support" or "child and spousal support"; in every instance, the reference is to payments from absent parents, not to child's insurance or other Social Security benefits.[10] Part D of

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[9] The statute's general usage of the term "child support" to refer to parental obligations is consistent with the dictionary definition. See *Black's Law Dictionary* 217 (5th ed. 1979) ("child support" defined as "[t]he legal obligation of parents to contribute to the economic maintenance, including education, of their children; enforceable in both civil and criminal contexts. In a dissolution or custody action, money paid by one parent to another toward the expenses of children of the marriage.").

[10] See 42 U.S.C. 602(a)(27) ("child support"); 42 U.S.C. 602 (a)(28) ("child support"); 42 U.S.C. 602(a)(31)(D) ("child support"); 42 U.S.C. 603(b)(2)(C) ("child support collections"); 42 U.S.C. 603a ("child support"); 42 U.S.C. 652(a)(1) ("child support"); 42 U.S.C. 652(a)(7) ("child and spousal support");

Title IV (42 U.S.C. 651-669) addresses a wide range of child support and paternity issues. It includes, among other things, provisions for the "Office of Child Support Enforcement" in HHS (42 U.S.C. 652); establishment of a Parent Locator Service (42 U.S.C. 653); requirements for a state plan for "child and spousal support" (42 U.S.C. 654); provisions for enforcement of an individual's legal obligation to provide "child support" or make alimony payments (42 U.S.C. 659); and a grant of authority for civil actions to enforce "child support" obligations (42 U.S.C. 660). Throughout this Title, the term "child support" has a specific meaning—the obligation of parents to support their children.[11]

In contrast to this repeated use of "child support" to refer to parental payments in Title IV, the Social Security Act does not use "child support payments" to refer to Social Security child's insurance benefits, or to any other kind of Social Security benefits. Indeed, under Title II, a child must, in certain circumstances, establish the level of a parent's previous "support" in order to qualify for the government-provided "child's insurance benefit." See, *e.g.*, 42 U.S.C. 402(d)(4) and (8). Nor does the fact that child's insurance benefits are intended to *replace* parental support after a parent has died, become disabled, or retired (*Califano* v. *Jobst*, 434 U.S. 47, 52 (1977); *Mathews* v. *Lucas*, 427 U.S. 495, 507 (1976)) mean that the child's insurance benefits themselves are encompassed in the ordinary usage of the term "child support payments." Certainly nothing in the Social Security Act—either in the AFDC or Child Support Enforcement programs under Title IV or in the "child's insurance benefits" program under Title II—indicates that the terms are interchangeable.

Likewise, the language of Section 2640 of DEFRA itself also reflects the general distinction between "child support payments" and Social Security benefits. While the disregard provision refers explicitly to "child support payments" (§ 2640(c), 98 Stat. 1146), the family income requirement includes a proviso explaining that the requirement applies "in the case of benefits provided under title II" (§ 2640(a), 98 Stat. 1145). In referring to Social Security payments under the Title II OASDI program, then, the DEFRA amendment does not use the term "child support payments." Rather, it speaks much more precisely of "benefits provided under Title II."[12]

2. In 1988, Congress amended the disregard provision in a manner that substantially supports the conclusion that "child support payments" refers to payments from absent parents. § 102(a), 102 Stat. 2346.[13] The disregard provision now requires

42 U.S.C. 652(a)(10)(B) ("Office of Child Support Enforcement"); 42 U.S.C 652(a)(10)(C) ("child support"); 42 U.S.C. 652(b) ("child support"); 42 U.S.C 653(c)(1) ("child and spousal support"); 42 U.S.C. 654 ("child and spousal support"); 42 U.S.C. 654(6) ("child support"); 42 U.S.C. 654(19)(A) ("child support"); 42 U.S.C. 654(19)(B) ("child support"); 42 U.S.C 656(b) ("child support"); 42 U.S.C. 657(a) ("child support"); 42 U.S.C. 659(a) ("child support"); 42 U.S.C. 659(b) ("child support"); 42 U.S.C. 659(d) ("child support"); 42 U.S.C. 661(b)(3) ("child support"); 42 U.S.C. 662(b) ("child support"). The 1982 version of Title IV also contains several references to "support payments" and "support obligations" that clearly refer only to payments from absent parents. See 42 U.S.C. 602(a)(26)(B) ("support payments"); 42 U.S.C. 651 ("support obligations"); 42 U.S.C. 653(a) ("support obligations"); 42 U.S.C. 654(5) ("support payments").

[11] This Court has recognized the parental child support purpose of these provisions of the Social Security Act. See, *e.g.*, *United States* v. *Morton*, 467 U.S. 822, 833 (1984) ("[T]he underlying purpose of § 659 is significant. The statute was enacted to remedy the plight of persons left destitute because they had no speedy and efficacious means of ensuring that their child support and alimony would be paid."); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 587 n.20 (1979) ("Section 459 [42 U.S.C. 659], added to the Social Security Act in 1975, * * * was part of a package of measures primarily designed to combat increases in welfare payments resulting from an inability to compel payment of support obligations from solvent but unwilling parents.").

[12] In a similar fashion, respondents' complaint itself did not use "child support payments" to refer to Social Security child's insurance benefits. See J.A. 19 ("child support payments or Social Security benefits"); J.A. 21 ("child support or Social Security income"); *ibid.* ("Social Security or child support payments"); J.A. 31 ("child support or Social Security benefits"); J.A. 32 ("child support or OASDI benefits"); *ibid.* ("child support and OASDI payments"); *ibid.* ("child suppport or OASDI benefits"); J.A. 34 ("child support or OASDI income"); *ibid.* ("child support or OASDI income").

[13] Because the relief ordered by the district court in this case is prospective, the amended disregard is directly applicable to the judgment under review. Consideration of the 1988 amendment would be appropriate, however, even if

that the state agency "shall disregard the first $50 of any child support payments for such month received in that month" and "the first $50 of child support payments for such month received in that month if such payments were made *by the absent parent* in the month when due." *Ibid.* (emphasis added).[14] The amended disregard thus explicitly refers to "child support payments" from "absent parents," and includes no language to suggest that "child support payments" is intended to have a broader scope.[15]

the relief were not prospective and the question was solely the interpretation of the disregard provision passed in 1984. Although subsequent congressional statements about prior congressional enactments pose special problems of analysis and interpretation (see *United States* v. *Price*, 361 U.S. 304 (1960)), subsequent congressional enactments may carry "considerable retrospective weight." *Heckler* v. *Turner*, 470 U.S. 184, 211 (1985). See also *South Carolina* v. *Regan*, 465 U.S. 367, 378-379 n.17 (1984).

The 1988 amendment was brought to the attention of the court of appeals before its decision in this case in a post-argument memorandum (and in the petition for rehearing), but the court did not address it.

[14] The amendment clarifies the disregard and pass-through treatment of payments received in a different month from the month in which they were paid, and provides that the disregard applies to timely payments by absent parents even if the payments are received in a subsequent month. H.R. Conf. Rep. No. 998, 100th Cong., 2d Sess. 98 (1988). Both the House and Senate Committee reports stated that the change was intended as a clarification. H.R. Rep. No. 159, 100th Cong., 1st Sess. 73 (1987); S. Rep. No. 377, 100th Cong., 2d Sess. 17 (1988). The Senate Committee report noted that the Committee viewed the amendment as reflecting "the original intent" (S. Rep. No. 377 *supra*, at 17), that "differences of interpretation may exist" (*ibid.*), and that "[t]he Committee does no intend that an inference should be drawn from the enactment of this provision or its effective date as to the meaning of the law as previously in effect" (*ibid.*). The Senate report's reference to differences in interpretation apparently refers to a dispute over the applicability of the disregard to late parental child support payments. See, *e.g.*, *Wilcox* v. *Ives*, 864 F.2d 915, 926 (1st Cir. 1988) (finding 45 C.F.R. 302.51(b)(1) "invalid" because it prohibited pass-through for multiple payments); 864 F.2d at 926 (Breyer, J., concurring) (noting that "Congress has recently enacted legislation that, for the future, adopts the Secretary's view"). In the wake of the amendments, 45 C.F.R. 232.20(d), 302.32, and 302.51(b) have been amended, effective October 1, 1990, to add new deadlines governing the State's treatment of the pass-through. See 54 Fed. Reg. 32,308-32,309 (1989).

[15] The pass-through provision was also amended to conform with the amendment in the disregard provision, and the amended pass-through provi-

The 1988 amendment, moreover, is a part of a statute—the Family Support Act of 1988—that contains many other sections addressing the problem of "child support." Once again, all of the other provisions using the term "child support" clearly use that term in the context of payments from absent parents.[16]

3. Finally, the child support disregard provision must be read in pari materia with the pass-through provision. The pass-through provision clearly involves payments from absent parents; it applies to payments collected and received by the state child support enforcement agency, and that agency collects child and spousal support payments from absent parents. See 42 U.S.C. 654(4)(B); 42 U.S.C. 657(b). Because the provisions

sion similarly refers to payments "made by the absent parent in the month when due." § 102(b), 102 Stat. 2346; see p. 3, *supra*.

[16] Title I of the Act, which includes the amendment of the child support disregard and the pass-through, is entitled "CHILD SUPPORT AND ESTABLISHMENT OF PATERNITY." § 101, 102 Stat. 2344. Subtitle A (which contains the disregard and the pass-through amendments) addresses "Child Support" (§§ 101-104, 102 Stat. 2344-2348); Subtitle B addresses "Establishment of Paternity" (§§ 111-112, 102 Stat. 2348-2350); and Subtitle C addresses "Improved Procedures for Child Support Enforcement and Establishment of Paternity" (§§ 121-129, 102 Stat. 2351-2356). Various individual provisions, besides the amendment of the disregard and pass-through provisions (§ 102), similarly reveal the use of "child support" to refer to payments from absent parents. See, *e.g.*, § 101, 102 Stat. 2344-2345 (amending 42 U.S.C. 666 to enhance procedures for withholding the "wages of an absent parent" in enforcing "child support orders"); § 103, 102 Stat. 2346-2348 (amending 42 U.S.C. 667 to provide state guidelines for evaluating "child support" awards and "child support" orders; referring to the state "child support enforcement agency"); § 121, 102 Stat. 2351 (referring to "requests to locate absent parents, establish paternity, and initiate proceedings to establish and collect child support awards"); § 122, 102 Stat. 2351 (referring to the "amounts collected as child support pursuant to the State's plan"); § 126, 102 Stat. 2354 (establishing a "Commission on Interstate Child Support" to improve "the interstate establishment and enforcement of child support awards"); § 129, 102 Stat. 2356 (requiring additional statistics regarding various "child support" issues, including "location of an absent parent for the purpose of establishing a child support obligation" and "location of an absent parent for the purpose of enforcing or modifying an established child support obligation"). The legislation also gave the Secretary additional responsibilities for issuing standards to guide state child support enforcement programs. See § 121(a), 102 Stat. 2351.

were enacted together in 1984 (and re-enacted with amendments in 1988) it is reasonable to conclude that both address the same kind of child support payments—payments from absent parents.

Moreover, the fact that the child support disregard has a parenthetical reference to the pass-through provisions—"(including support payments collected and paid to the family under section 657(b) of this title [42 U.S.C. 657(b)])"—does not support a conclusion that the term "any child support payments" should be interpreted to refer to Social Security benefits. Some parental child support payments are not received directly by the family, and the AFDC and Child Support Enforcement programs have specific regulations to address the treatment of such payments. See 45 C.F.R. 233.20(a)(3)(v), 302.31(a)(3), 303.80. Thus, the fact that the term "any child support payments" in the disregard "include[s]" parental payments collected by the State pursuant to 42 U.S.C. 657 is entirely consistent with a view that the term applies only to parental child support payments. The parenthetical provides no basis for concluding that the term "child support payments" in the disregard provision has a different meaning than it has in other Social Security Act provisions.

B. The Legislative History Of The $50 Disregard Supports The Conclusion That The Term "Child Support Payments" Does Not Include Social Security Benefits

The legislative background of the disregard provision also suggests that "child support payments" should be interpreted to refer to payments from absent parents.

The prevalence of non-support by absent parents has long been recognized as a central problem of the AFDC program. As early as 1950, only fifteen years after the initial passage of the program (Social Security Act, ch. 531, Tit. IV, 49 Stat. 627 (1935)), Congress included in the AFDC statute a requirement that States "provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to dependent children in respect of a child who has been deserted or abandoned by a parent." Social Security Act Amendments of 1950, ch. 809, § 321(b), 64 Stat. 550. In 1967, the House Ways and Means Committee reported that the existing "provision has not been broad enough to accomplish objectives which the committee believes are essential—securing support from the deserting or abandoning parent in every possible case." H.R. Rep. No. 544, 90th Cong., 1st Sess. 100 (1967). In response to that concern, in the Social Security Amendments of 1967, Congress enacted a number of amendments to the AFDC program; one of these amendments required that the State, "in the case of any child receiving such aid who has been deserted or abandoned by his parent, * * * secure support for such child from such parent (or from any other person legally liable for such support)." Pub. L. No. 90-248, § 291(a)(1)(B), 81 Stat. 878-879 (1968).

In 1974, Congress concluded that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents" (S. Rep. No. 1356, 93d Cong., 2d Sess. 42 (1974)). Accordingly, Congress determined that further changes in the AFDC program were necessary. Social Services Amendments of 1974, Pub. L. No. 93-647 (1975), 88 Stat. 2351-2360. The changes required the assignment of child support payments to the State for collection and enforcement (88 Stat. 2359; 42 U.S.C. 602(a)(26)(A) (1982 & Supp. V 1987)). The changes also required, as a condition of AFDC eligibility, that a recipient assist in establishing the paternity of a child with respect to whom aid was claimed, and in obtaining support payments from the absent parent (88 Stat. 2359-2360; 42 U.S.C. 602(a)(26)(B) (1982 & Supp. V 1987)). Most comprehensively, Congress added an entire new part—Part D—to Title IV of the Social Security Act to address various child support and paternity issues, including procedures and requirements for the state administration of the new child support and collection responsibility in the AFDC program (88 Stat. 2351-2358; 42 U.S.C. 651 *et seq.*).

The 1974 amendments also required, for a fifteen-month period begining in July, 1975, that 40% of the first $50 per month of child support payments collected by the State pur-

suant to the assignment of child support rights would be passed through to the AFDC family and disregarded in AFDC eligibility and assistance determinations. (88 Stat. 2356-2357, 2359; 42 U.S.C. 657(a)(1), 42 U.S.C. 602 note at 815). The stated purpose of this disregard was to encourage cooperation by the custodial parent in obtaining child support payments from the absent parent; the disregard would give "the mother a financial incentive to cooperate" and would ensure that "the family would always be better off if support payments are made by the absent parent." S. Rep. No. 1356, 93d Cong., 2d Sess. 52 (1974).

As the Eighth Circuit concluded in *Todd* v. *Norman* (840 F.2d at 610-611), it is reasonable to assume that the DEFRA disregard provision has a similar purpose. To be sure, the sparse legislative history of DEFRA does not explicitly advert to the purpose of the disregard,[17] but both the 1974 disregard and its 1984 counterpart appear in the context of provisions regarding the payment and collection of child support obligations, and both employ a benchmark of $50 per month. These similarities suggest that, as in the 1974 Amendments, "[t]he problem addressed by the child support disregard is the collection of child support from absent parents. Child's Insurance Benefits simply are not part of that problem." *Todd* v. *Norman*, 840 F.2d at 612.

Other aspects of the legislative history of DEFRA amendments (and the child support disregard) also support the Secretary's interpretation. The Senate report explaining the family income requirement refers to "social security or child support payments." See 1 Senate Comm. on Finance, S. Prt. 98-169, 98th Cong., 2d Sess., *Deficit Reduction Act of 1984*, at 980 (Comm. Print 1984) (family unit rule intended to end practice by which "a family might choose to exclude a child who is

[17] The family income requirement was added to DEFRA by the Senate. The disregard and pass-through provisions were then added to the bill in conference; the explanation in the legislative history is brief and summary. See H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1407 (1984) ("The conference agreement follows the Senate amendment with the following modification: a[] monthly disregard of $50 of child support received by a family is established. The disregard is applied at eligibility determination and benefit calculation.").

receiving social security or child support payments, if the payments would reduce the family's benefits by an amount greater than the amount payable on behalf of the child"). As the Eighth Circuit concluded, this explanation suggests congressional treatment of " 'Social Security benefits' and 'child support' as separate and distinct sources of income." *Todd* v. *Norman*, 840 F.2d at 611.[18]

Moreover, the DEFRA amendments were passed contemporaneously with the Child Support Enforcement Amendments of 1984, Pub. L. 98-378, 98 Stat. 1305. DEFRA was enacted on July 18, 1984 (98 Stat. 1210); the Child Support Enforcement Amendments were enacted on August 16, 1984 (98 Stat. 1330). The same committees were responsible for both pieces of legislation (the House Ways and Means Committee and the Senate Finance Committee). The Child Support Enforcement Amendments of 1984, which extensively amended Part D of Title IV, added a variety of tools for enhancing child support enforcement—including mandatory income withholding (98 Stat., 1307-1308); enhanced incentive payments to States (98 Stat. 1312-1314); and state commissions on child support (98 Stat. 1320-1321)—and consistently used the term "child support" to refer to payments from absent parents. As the Conference Report summarizes, the purpose of the Child Support Enforcement Amendments was "to assure * * * that all children in the United States who are in need of assistance in securing financial support from their parents will receive such assistance regardless of their circumstances." H.R. Conf. Rep. No. 925, 98th Cong., 2d Sess. 1 (1984).[19] Given the focus in this contemporaneously enacted statute on strengthening incentives for child support en-

[18] The discussion of other DEFRA provisons in the legislative history also reflects this distinction. See, *e.g.*, 1 Senate Comm. on Finance, *supra*, at 984 (referring to Title II benefits as "OASDI benefits"); *id.* at 985 (referring to a "child support order" and the obligations of an "absent parent"). See also H.R. Conf. Rep. No. 861, *supra*, at 1391, 1409 (discussing same provisions and using same terminology).

[19] See also § 23(a), 98 Stat. 1329, ("The Congress finds that * * * there is a critical lack of child support enforcement, which Congress has undertaken to address through the child support enforcement program.").

forcement, it is reasonable to assume that the adoption of the $50 disregard for "child support payments" as part of DEFRA had a similar purpose. See *Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972); *United States* v. *Stewart*, 311 U.S. 60, 64 (1940).

C. The Secretary's Determination That The Term "Child Support Payments" Refers Only To Payments From Absent Parents Is Entitled To Deference

Even if the meaning of the term in the statute were unclear, the Secretary's interpretation is entitled to deference. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).[20] Consistent with this principle, this Court has repeatedly emphasized that the agency charged with administering the complex AFDC legislation is entitled to deference in its interpretation of the statute.[21] The court of appeals concluded that "Congress has offered no answer to this question" (Pet. App. 8a-9a); if this were true, the appropriate response should have been to defer to the

[20] See also *Young* v. *Community Nutrition Institute*, 476 U.S. 974, 980-981 (1986); *Chemical Manufacturers Ass'n* v. *NRDC*, 470 U.S. 116, 125 (1985).

[21] See *Quern* v. *Mandley*, 436 U.S. 725, 738 (1978) (HEW's interpretation of AFDC provision, as "[t]he interpretation of the agency charged with administration of the statute is, of course, entitled to substantial deference"); *New York Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 420 (1973) (deferring to HEW as "the agency of Government responsible for administering the Federal Social Security Act—including reviewing of state AFDC programs"); *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970) ("We give HEW the difference due the agency charged with the administration of the [Social Security] Act" in AFDC case); *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970) (HEW's construction of AFDC provision "is entitled to weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program it administers"). In 1979, the Department of Health and Human Services replaced the Department of Health, Education and Welfare (HEW) as the federal agency responsible for administering the AFDC program. Department of Education Organization Act, Pub. L. No. 96-88, Tit. V, § 509(b), 93 Stat. 695; 20 U.S.C. 3508(b).

interpretive answer provided by the agency charged by Congress with the administration of the AFDC program.

In response to DEFRA, the Secretary promulgated regulations and provided interpretive instructions to implement changes in the AFDC program. 49 Fed. Reg. 35,586-35,606 (1984). The Secretary established a procedure for state agencies to follow in forwarding the first $50 of parental support payments to a family (45 C.F.R 302.51(b)(1); Pet. App. 40a-41a), and required that $50 per month of the child support collections be excluded from AFDC eligibility determinations (45 C.F.R. 232.20(a) and (b); Pet. App. 40a). The Secretary also required disregarding the first $50 of child support payments made directly to the family from absent parents, and the first $50 of voluntary support payments on behalf of children for whom an assignment had been made. 49 Fed. Reg. 35,590 (1984). See also 50 Fed. Reg. 34,693 (1985); 53 Fed. Reg. 21,643, 21,644 (1988).[22] The Secretary did not, however, apply the $50 disregard to any form of payments other than parental support payments, such as child's insurance benefits. See 49 Fed. Reg. 35,589-35,590; 35,604-35,605 (1984).[23] The Secretary has referred to the example of the prior disregard (49 Fed. Reg. 35,605 (1984)), and has concluded that a purpose of the current

[22] One of the regulations adopted by the Secretary—45 C.F.R. 233.20(a)(4)(ii)(j), promulgated at 49 Fed. Reg. 35,600 (1984) (specifying that various child support payments from absent parents should be disregarded in assistance determinations)—does not appear in the Code of Federal Regulations; instead, 45 C.F.R. 233.20(a)(4)(ii)(j) now states, "[Reserved]." This anomaly came about because it was anticipated that an unrelated rule (see 49 Fed. Reg. 48,550 (1984)) would be published before the DEFRA regulation; that unrelated rule had been intended to "reserve" 45 C.F.R. 233.20(a)(4)(ii)(j) for the DEFRA regulation and thus included only the word "[Reserved]" after that citation. Contrary to expectation, however, the unrelated rule was actually published *after* the DEFRA regulation had been promulgated; the unrelated rule thus substituted "[Reserved]" for the language of the DEFRA regulation. Consequently, the text of the DEFRA regulation promulgated by the Secretary in September, 1984 was inadvertently deleted in December, 1984 by the promulgation of the unrelated rule.

[23] See also note 3, *supra* (explaining circumstances in which an absent parent's spousal support may receive the disregard).

disregard is to provide incentives for cooperation by the custodial parent and payment from the non-custodial parent (53 Fed. Reg. 21,643 (1988)).[24] The Secretary has thus interpreted DEFRA and has determined that the child support disregard applies only to parental child support payments.

Notwithstanding the ordinary deference accorded to the interpretation of the agency charged with interpreting and administering a complex statute, the court of appeals concluded that the Secretary's interpretation of the scope of the disregard was irrational for three asserted reasons: (1) the purpose of the disregard was solely to mitigate the hardship produced by the DEFRA amendments, and this purpose precludes differential treatment of child's insurance benefits; (2) child's insurance benefits are derived from a parent's earnings and thus should be treated like child support payments; and (3) some States permit child's insurance benefits to satisfy child support obligations and therefore child's insurance benefits should receive the same disregard as child support payments. None of these assertions provides a basis for overriding the Secretary's interpretation.

1. In concluding that the purpose of the disregard was exclusively to mitigate hardship—and that the Secretary's interpretation of the scope of the disregard must therefore be rejected—the court of appeals placed extensive reliance on a statement in this Court's opinion in *Bowen* v. *Gilliard*. Pet. App. 10a.[25] But nothing in *Bowen* v. *Gilliard* suggests that mitigating

[24] The HHS Departmental Appeals Board has also noted the Department's view of the incentive purpose for the disregard, and upheld the exclusion of child's insurance benefits from the disregard. See *Georgia Department of Human Resources*, Doc. No. 88-40, Dec. No. 995, at 7, 16 (Nov. 4, 1988). Copies of the decision have been provided to respondents and lodged with the Clerk of the Court.

[25] The court of appeals (Pet. App. 10a n.3) quoted this statement form *Bowen* v. *Gilliard:* "Because the 1984 amendments forced families to include in the filing unit children for whom support payments were being received, the practical effect was that many families' total income was reduced. The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the State must be remitted to the family and not counted as income for the purpose of determining its benefit level." 483 U.S. at 594 (footnotes omitted).

hardship is the sole purpose of the disregard, and nothing in that opinion is inconsistent with a view that one object of the disregard was to encourage child support payments from non-custodial parents. The payments involved in *Gilliard* were child support payments from noncustodial parents (483 U.S. at 589-590), and thus this Court had no occasion to consider possible differences between those payments and child's insurance benfits. The passage quoted by the court of appeals described the operation of the disregard in the context before the Court; it clearly was not a holding about the sole purpose of the disregard, or its scope.

In concluding that the disregard's purpose was solely to mitigate hardship, the court of appeals also rejected the relevance of the only prior child support disregard—which clearly was intended to act as an "incentive" for cooperation by the custodial parent and ensure that "the family would always be better off if support payments are made by the absent parent". S. Rep. No. 1356, 93d Cong., 2d Sess. 52 (1974). The court stated that "the intent of one Congress cannot be inferred from the activities of another Congress." Pet. App. 9a. However, the meaning of a prior statute is often relevant to successor statutes on the same subject.[26] Particularly when Congress enacts a massive omnibus statute like DEFRA, and adopts provisions which are patterned after earlier enactments, it is reasonable to assume, absent some indication to the contrary, that the new provision is designed to further the same purpose as its forerunner. This is especially true where the proposition involves a highly specialized subject matter—such as the meaning of an AFDC disregard for child support payments.

Moreover, the court of appeals erroneously concluded that the situation confronting Congress in 1974 was entirely different from the circumstances of 1984. The court's basic contention—that legislative actions to require family cooperation and

[26] See *e.g.*, *Xerox Corp.* v. *County of Harris*, 459 U.S. 145, 150 (1982) (analyzing "forerunner of the present statute"); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 541 (1954) ("To read the Defense Production Act of 1950 without reference to [a predecessor statute] * * * is to read it out of the context in which Congress enacted it.").

improve state incentives for "tracking down nonresident parents who are delinquent in making child support payments" had "substantially eviscerated" the justification for the disregard as a parental payment incentive (Pet. App. 10a)—is belied by repeated congressional findings that nonpayment of child support by noncustodial parents remains a grave national problem.[27] Indeed, respondents' own submission to the district court illustrates the continuing relevance of incentives for parental child support payments. See J.A. 46 (Affidavit of David Jones) ("If my son is going to be forced to receive ADC, and my money will be used to finance the ADC program, I see no reason for me to keep paying child support.").[28]

Thus, the court of appeals erred in concluding that its reading of the purpose of the disregard justified rejecting the Secretary's interpretation.[29]

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[27] See, *e.g.*, § 23(a), 98 Stat. 1329; H.R. Rep. No. 159, 100th Cong., 1st Sess. 40 (1987). See also *Hicks* v. *Feiock*, 108 S. Ct. 1423, 1436 (1988) (O'Connor, J., dissenting) (" 'The failure of enforcement efforts in this area has become a national scandal.' • • • The facts of this case illustrate how easily a reluctant parent can evade a child support obligation. Congress recognized the serious problem of enforcement of child support orders when it enacted the Child Support Enforcement Amendments of 1984.").

[28] See also *Bowen* v. *Gilliard*, 483 U.S. at 598 ("The District Court had before it evidence that the DEFRA amendments were severely impacting some families. For example, some noncustodial parents stopped making their support payment because they believed that their payments were helping only the State, and not their children.").

The court of appeals also plainly erred in stating that at the time of the 1974 disregard, "social security payments were not a factor in determining a family's eligibility for AFDC, so there was no occasion for Congress to consider whether the disregard should also apply to such payments." Pet. App. 9a. At that time, child's insurance benefits were counted as part of an applicant's income if the family filing unit included the child receiving the child's insurance benefits. Before the family income requirement, the family had *the option* of whether to include the child or not, but the court of appeals is incorrect in suggesting that social security payments were never "a factor" in AFDC determinations before the family income requirement. See 1 Senate Comm. on Finance, *supra*, at 980.

[29] We do not dispute that one aspect of the child support disregard is that it mitigates hardship. By definition, AFDC recipients are needy, and there is no question that any disregard—or any increase in benefits—mitigates hardship. But the disregard at issue here is not a general $50 bonus for all AFDC recipients, nor is it applicable to income from all sources; it is confined to "any child support payments." Thus it is reasonable to conclude that the disregard serves multiple purposes, one of which—an incentive to obtain payments from absent parents—is related to the defining term ("child support payments").

To the extent that the court of appeals concluded that the disregard was enacted solely to mitigate the hardship of the family income requirement, moreover, the child support disregard was ill-tailored to serve that exclusive purpose. The disregard did not mitigate hardship from the change for all families adversely affected by it (*i.e.*, families in which family members with other sources of income had previously been excluded from the family filing unit), and it did provide an additional $50 per month for some families who were not adversely affected by the family income requirement (*i.e.*, families in which children for whom parental child support payments were made had previously been included in the filing unit). Moreover, even if the purpose is limited to mitigation of hardship, an incentive aspect remains: the disregard for child support payments from absent parents only mitigates hardship if payments are actually made by the absent parent.

2. The court of appeals also rejected the Secretary's interpretation because it could perceive no rational "distinction between support derived directly from a father's wages and support provided indirectly through Title II payments." Pet. 11a. But there are many differences between the two types of payments, and these differences justify differential treatment. Most obviously, there is a fundamental distinction because child's insurance benefits are paid and guaranteed by the federal government; parental child support payments, in contrast, are dependent on the resources and compliance of an absent parent. The fact that child's insurance benefits result from the coverage of an insured wage earner does not alter the fact that their payment is automatic, whereas the payment of child support is often highly uncertain.[30]

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[30] The court of appeals emphasized that, under the Secretary's interpretation, a child receiving child's insurance benefits is treated less favorably than a child for whom child support payments from an absent parent are paid and stated that there is "[n]o rational basis" for a distinction between them. Pet. App. 12a. Because the federal government pays child's insurance benefits, however, under the court of appeals' holding, the child receiving child's insurance benefits would be considerably advantaged over the child relying on parental child support payments; the child receiving child's insurance benefits would receive the $50 per month disregard automatically, while the child rely-

Other distinctions are also apparent. While parental child support payments involve the problem of support from absent, living parents, child's insurance benefits are frequently paid under entirely different circumstances. See *Todd* v. *Norman*, 840 F.2d at 610 n.2 The largest number of child's insurance recipients consists of the children of deceased parents;[31] other child's insurance benefits are paid to children living with a disabled parent. 42 U.S.C. 402(d)(1). Child support payments from absent parents, moreover, may vary according to the parent's current resources or the child's actual needs. H. Krause, *Child Support in America* 18 (1981). Child's insurance benefits, in contrast, are paid according to a formula based on the insured wage earner's prior wages. *Califano* v. *Jobst*, 434 U.S. at 52; *Hopkins* v. *Cohen*, 390 U.S. 530, 531-532 (1968); 42 U.S.C. 402(d)(2). Rather than the virtual identity claimed by the court of appeals, then, child's insurance benefits and child support payments have fundamentally different characteristics; their supposed similarity thus provides a weak basis for overriding the Secretary's judgment that child's insurance benefits are not included in the statutory term "child support payments."

3. Finally, the court of appeals emphasized that some States permit child's insurance benefits to satisfy child support obligations. Pet. App. 11a-12a. This state court treatment was apparently viewed as important because, as the district court stated, a "family's eligibility for the $50 remittance should not turn upon the absent father's ability to work. For example, the law should not allow a family to receive the $50 rebate when a child is supported by a working father, but deny that family the rebate when the father becomes disabled and must provide the support indirectly through Social Security benefits." *Id.* at 20a. If this is the theory, however, it is wholly inapplicable to a large category of child's insurance benefits recipients—those who

ing on payments from an absent parent would receive the disregard only when payments are made by the absent parent.

[31] Two of the named plaintiffs—Crystal McClanahan and Robert Turner—receive child's insurance benefits because the child's father is deceased. See J.A. 29, 30, 54.

are beneficiaries because an insured parent has died, including two of the named plaintiffs here (see J.A. 29, 30, 54).[32] For the many children receiving child's insurance benefits because of a deceased parent, there is no outstanding child support obligation from that parent at all, and the reliance on state treatment of the child's insurance benefits as satisfying outstanding child support obligations is simply irrelevant.

Even as to those recipients of child's insurance benefits whose insured parents are under outstanding child support obligations, however, the court's reliance on the state courts' treatment of the benefits is unfounded. As an initial matter, a State's conclusion that child's insurance benefits *satisfy* the obligation of providing child support does not mean that child's insurance benefits *become* child support payments. Moreover, state treatment of child's insurance benefits in the context of child support obligations varies widely. Some States have not permitted child's insurance benefits to satisfy child support obligations; other States have permitted such treatment only after an extensive equitable analysis. See *Todd* v. *Norman*, 840 F.2d at 611; Annotation, *Right To Credit On Child Support Payments For Social Security Or Other Government Dependency Payments Made For Benefit Of Child*, 77 A.L.R.3d 1315 (1977 & Supp. 1989). Even for those children who have outstanding child support obligations from absent parents, then, state treatment of the child's insurance benefits is varied and inconsistent.

Accordingly, state treatment of child's insurance benefits with respect to outstanding child support obligations—like the other two factors cited by the court of appeals—fails to justify rejection of the Secretary's interpretation of the scope of the "child support" disregard.

[32] As discussed, moreover, when a child receives child's insurance benefits because an insured parent is disabled, the parent need not even be "absent," in contrast to the district court's example of an "absent father."

D. Excluding Social Security "Child's Insurance Benefits" From The "Child Support" Disregard Does Not Raise Constitutional Problems

The court of appeals also relied on concerns about the constitutionality of the disregard if it does not apply to Social Security child's insurance benefits.[33] However, a congressional determination to disregard the first $50 of child support payments from absent parents, but not child's insurance benefits, easily passes constitutional muster. This kind of "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Bowen* v. *Gilliard*, 483 U.S. at 601 (internal quotations omitted). As discussed, an evident purpose of the $50 disregard was to help secure the cooperation of beneficiaries in the collection of support payments and to provide a payment incentive for noncustodial parents. No such incentives are needed with respect to child's insurance benefits, whose payment is guaranteed by the federal government. This difference is surely sufficient to sustain limiting the disregard to parental support payments. The problem of nonpayment of child support remains a congressional priority.[34] Despite the court of appeals' pessimism about the efficacy of a $50 incentive in light of subsequent developments, it was clearly permissible for Congress to decide that a further incentive to collection and payment of parental support payments was needed. See generally *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

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[33] See Pet. App. 12a ("No rational basis exists for according one class of families the mitigating benefit of the disregard provision while depriving another arguably indistinguishable class of families of the same benefit. • • • This sort of unreasoned distinction raises equal protection concerns.").

[34] See, *e.g.*, § 23(a), 98 Stat. 1329; 134 Cong. Rec. S7651(daily ed June 13, 1988) (statement of Sen. Bentsen) ("If we want to reform the welfare system, let us start with an all-out effort to collect child support. The Congress enacted strong legislation in 1975 and in 1984, but despite that legislation only a small fraction of children who live with single parents receive the full credit as awarded to them by the courts. Many receive nothing at all.").

The court of appeals' summary invocation of "equal protection concerns" (Pet. App. 12a) plainly does not warrant construing the term "child support" in the disregard in a manner contrary to its usage in other parts of the AFDC program and the Social Security Act; nor does it justify overriding the Secretary's judgment about the meaning of that term for the program he is charged with administering. The principle that statutes should be construed to avoid constitutional problems is applicable when there is "a serious doubt of their constitutionality." *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961). Applying the child support disregard to payments from absent parents and not applying it to child's insurance benefits raises no such "serious doubt."

CONCLUSION

The judgment of the court of appeals should be reversed.

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No. 89-535

In The

Supreme Court of the United States

October Term 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

ELIZABETH STROOP, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF LARRY D. JACKSON, COMMISSIONER, VIRGINIA DEPARTMENT OF SOCIAL SERVICES AS RESPONDENT SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Social Security child's insurance benefits, paid under 42 U.S.C. § 402(d), are "child support payments" within the meaning of an Aid to Families With Dependent Children (AFDC) provision, 42 U.S.C. § 602(a)(8)(A)(vi), which requires that the first $50 per month of child support payments be disregarded in determining AFDC eligibility and assistance levels.

PARTIES TO THE PROCEEDINGS

The petitioner is the Secretary of Health and Human Services. The respondents are plaintiffs Elizabeth Stroop, Melissa Lam by her next friend Elizabeth Stroop, Bret Lam by his next friend Elizabeth Stroop, Jamie Stroop by her next friend Elizabeth Stroop, Geneva Powers, Crystal McClanahan by her next friend Geneva Powers, Dorothy Brown, and Robert Lee Turner by his next friend Dorothy Brown, on behalf of themselves and all others similarly situated. The plaintiffs in the district court included Karen B. Carter, Ragene Carter by her next friend Karen B. Carter, Paul Jones, Cory P. Jones by his next friend Paula Jones, and David L. Jones, but they were neither appellants nor appellees in the court of appeals. The Commissioner of the Virginia Department of Social Services was a defendant in the district court and a separate appellee in the court of appeals; the Commissioner was not an appellant in the court of appeals regarding the present issue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 870 F.2d 969. The opinions of the district court (Pet. App. 14a-22a, 23a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1989. A petition for rehearing *en banc* was

denied on May 31, 1989 (Pet. App. 31a-34a). On August 25, 1989, Chief Justice Rehnquist extended the time for filing a petition for writ of *certiorari* to September 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Because of their length, the provisions of law in this case are set out verbatim in the Petition, Appendix G. Those provisions of law are:

> Sections 402(a)(7)(A) and (8)(A)(vi), 457(b)(1), and 202(d)(1) of the Social Security Act (42 U.S.C. §§ 602(a)(7)(A) and (8)(A)(vi) (Supp. V 1987); 42 U.S.C. § 657(b)(1) (Supp. V 1987); 42 U.S.C. § 402(d)(1) (1982 & Supp. V 1987)) (Pet. App. 35a-39a). Aid to Families with Dependent Children (AFDC) regulations 45 C.F.R. § 302.51(b)(1) and 45 C.F.R. § 232.20(a) and (d) (Pet. App. 40a-41a).

STATEMENT OF THE CASE

This case concerns the scope of the $50 per month disregard for "child support payments" that Congress required the states to apply in determining AFDC eligibility and benefit levels.

In the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, § 2640, 98 Stat. 494, 1145-46 (1984), several changes were made to the AFDC program. Section 402(a) of the Social Security Act (42 U.S.C. § 602(a)) was amended by the addition of paragraph 38, which required

that, for purposes of AFDC eligibility determinations, the income of any sibling or parent living in the same household must be included as a part of the AFDC family's income.[1]

DEFRA further amended Title IV of the Social Security Act by adding two provisions: the first, requiring the payment to the AFDC family of the first $50 of monthly support collected by the state under its Child Support Enforcement Plan under Title IV-D of the Social Security Act ("pass through"),[2] and the second, providing for the

[1] Prior to 1984, all co-resident family members were not required to be included within the AFDC unit. Thus, a family could maximize its AFDC benefits by excluding members with income.

[2] "The amounts collected as support by a state pursuant to a plan approved under this part (42 U.S.C. §§ 651 *et seq.*) . . . shall be distributed as follows:

> 1. [t]he first $50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance to such family during such month."

DEFRA § 2640(b), 98 Stat. 494, 1145 (1984); 42 U.S.C. § 657(b)(1) (Supp. V 1987).

In 1988, Congress amended this provision (Family Support Act of 1988, Pub. L. 100-485, Tit. I, § 102(b), 102 Stat. 2346) to provide: *"[O]f such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due* shall be paid to the family without affecting its eligibility for assistance or decreasing any

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disregard, for AFDC eligibility purposes, of the first $50 of child support payments received with respect to the dependent children in the family.[3] Under normal circumstances, child support payments assigned to the state are collected by the state (42 U.S.C. § 654). Section 2640(b) of DEFRA requires that the first $50 per month of such amount collected by the State be passed through to the family. There are circumstances, however, when assigned

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amount otherwise payable as assistance to such family during such month." (Emphasis added to show amended language.)

[3] "[I]n making the determination under paragraph (7), the State agency –

> . . . (vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title)."

DEFRA § 2640(c), 98 Stat. 494, 1146 (1984); 42 U.S.C. § 602(a)(8).

In 1988, Congress further amended this disregard provision (Family Support Act of 1988, Pub. L. 100-485, Tit. I, § 102(a), 102 Stat. 2346) to provide: "[I]n making the determination under paragraph (7), the State agency . . . (vi) shall disregard the first $50 of any child support payments *for such month received in that month and the first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due,* with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title)." (Emphasis added to show amended language.)

child support payments are paid directly to the family. In these instances states have the option of collecting these payments directly from the family (IV-D option) or allowing the family to retain the support payment, treating it as income in calculating AFDC benefits (IV-A option) (45 C.F.R. § 302.31(a)(3)(ii)). For states exercising the IV-A option, since the state did not collect the support, it has nothing to pass through to the family. The disregard provided in § 2640(c) of DEFRA extends the same treatment to these families as those whose child support payments were made directly to the state and received the $50 pass through. The question before the Court is whether that treatment extends to benefits under Title II of the Social Security Act.[4]

The Secretary published regulations implementing the family income requirement and the disregard for child support payments (49 Fed. Reg. 35599 (1984), 45 C.F.R. § 206.10(a)(1)(vii)). Those regulations required that an applicant for AFDC benefits include the income of any sibling or parent living in the same household. *Id.* The regulations applied to siblings who receive Title II Social Security benefits, as well as to those who receive other income, making these payments a part of the AFDC family income calculation. The regulations further required a $50 per month disregard from child support payments received from noncustodial parents, but did not require a

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[4] Title II of the Social Security Act (42 U.S.C. § 401 *et seq.*) makes insurance benefits available to children whose parent was an insured wage earner under the Act in the event such parent dies, becomes disabled, or retires. Such benefits are not assignable at law or in equity (42 U.S.C. § 407(a)).

$50 per month disregard for any other type of payments, including Title II child's benefits. Virginia's implementing regulations paralleled the Secretary's regulations.

On June 23, 1986, respondents[5] filed a class action against the Secretary and the Commissioner of the Virginia Department of Social Services to challenge the regulations promulgated by the Secretary and the corresponding state regulations.[6]

After this Court's decision in *Bowen v. Gilliard*, 483 U.S. 587 (1987), which upheld the constitutionality of the family income requirement, respondents voluntarily dismissed the claims of children receiving child support and the claims of the noncustodial parents paying such support. Respondents continued to argue, however, that the required inclusion of children receiving Title II benefits in the AFDC assistance unit constituted an involuntary diversion of their benefits in violation of the anti-alienation provision of the Social Security Act, 42 U.S.C. § 407(a), and the provisions of the Act governing the duties of representative payees (42 U.S.C. § 408(e)). In the alternative, respondents claimed that if the inclusion of children receiving Title II benefits were upheld, the first $50 of their monthly benefits should be excluded as "child support payments," and disregarded in calculating

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[5] Although Larry D. Jackson is technically a respondent in this appeal (Sup. Ct. R. 12.4), references in this brief to "respondents" refer only to plaintiffs.

[6] The named plaintiffs consisted of five Virginia families, each of which included children receiving AFDC and other children, not receiving AFDC, who received child support or Title II benefits.

eligibility and benefit levels (42 U.S.C. § 602(a)(8)(A)(vi)).

The district court upheld the Secretary's inclusion of Title II benefits as income under the family income requirement (Pet. App. 14a-22a).

The district court further held that the $50 disregard provision (42 U.S.C. § 602(a)(8)(A)(vi)) must be applied to Title II benefits, as well as child support payments. *Id.* The court held that the purpose of the disregard was to "mitigate" the hardship imposed by the DEFRA amendments, and concluded that since children receiving social security benefits and children receiving child support payments suffer equally under the amendment, the families should equally enjoy the relief provided by the disregard. *Id.* at 22a. The court found the Secretary's treatment to be "demonstrably irrational." *Id.* at 18a. On March 4, 1988, the district court denied the Secretary's motion to alter or amend the decision regarding the $50 disregard (Pet. App. 23a-27a).

The Secretary appealed from the district court's determination on the $50 disregard, and respondents cross-appealed on the assistance unit ruling. The court of appeals affirmed the judgment of the district court in its entirety, upholding the Secretary's inclusion of Title II benefits as income under the family income requirement and the requirement that the first $50 of such payments be disregarded in calculating family income (Pet. App. 1a-13a). The court rejected the Secretary's interpretation that the purpose of the disregard was to serve as an incentive for obtaining child support payments from noncustodial parents. *Id.* at 10a. The court, relying on this

Court's comment in *Bowen v. Gilliard*, 483 U.S. 587 (1987), that the burden of the family income requirement was "mitigated" by the pass through of the first $50 of child support collected by the state, concluded the disregard of the first $50 of social security payments serves the same purpose. *Id.*

On May 31, 1989, the court of appeals denied the Secretary's petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 31a-34a).

On January 8, 1990, this Court granted the Secretary's petition for writ of certiorari to determine whether Title II child's benefits are properly considered "child support payments" for purposes of the $50 per month disregard. On that date this Court denied respondents' cross-petition on the question of whether Title II child's benefits are properly subject to the family income requirement.

SUMMARY OF ARGUMENT

In enacting the $50 per month disregard for "child support payments," Congress does not define that term. The term, however, does have a commonly understood meaning: monies paid by a parent to another toward the expenses of a child for whom the parent has a legal obligation to provide economic maintenance. Title II benefits do not fall within this commonly understood meaning. They are neither paid by a parent nor are they based upon the legal obligation of a parent to support a child.

In addition, Congress has used the term "child support" numerous times within Title IV of the Social Security Act and consistently uses it to refer to a payment by a noncustodial parent pursuant to a legal obligation. "A legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). The legislative history surrounding the enactment of the family income requirement in § 2640(a) of DEFRA indicates that Congress recognized the distinction between social security "benefits" and "child support payments."

Both the "pass through" and disregard provisions were added to DEFRA by the conference committee. The conference report reveals nothing of Congress' intent in enacting these provisions. In such circumstances, it is particularly appropriate to afford deference to the Secretary's interpretation unless that interpretation is unreasonable.

The Secretary's interpretation is not unreasonable. In the years surrounding the enactment of the disregard, Congress has repeatedly expressed concern over the problem of the nonpayment of child support by noncustodial parents. Nor is Congress a stranger to the use of financial incentives to encourage the establishment and collection of child support payments from noncustodial parents, having enacted a similar incentive for a 15-month trial period in 1974. Further, increasing child support payments, which move families off AFDC and reimburse the federal treasury, is a goal consistent with a spending reduction measure.

Nor is it unreasonable to distinguish between child support payments from noncustodial parents and Title II benefits. The Social Security Administration does not need an incentive to pay benefits to those entitled. History has shown that noncustodial parents do need incentives, both positive and negative, to make regular child support payments. A noncustodial parent may well be encouraged to make such payments knowing that the family will receive a bonus. A custodial parent needs little incentive to fill out application forms for social security benefits, but it is significantly different to ask a custodial parent to become engaged in the judicial process against a former spouse or paramour.

The Secretary's reading of the $50 disregard should be upheld. It is consistent with the commonly understood meaning of "child support," Congress' use of that term consistent with that meaning, and with Congress' expressed concern with the problem of the lack of child support.

ARGUMENT

A.

The Secretary's Interpretation Of The $50 Disregard Is Consistent With Congressional Intent As Expressed In The Language Of The Statute

In enacting the $50 per month disregard, Congress uses the term "child support payments" but does not define it. Therefore, in order to determine whether Title II benefits are "child support payments" subject to the $50

disregard, this Court must ascertain the intent of Congress and interpret the AFDC statute accordingly. *United States v. American Trucking Assoc., Inc.*, 310 U.S. 534, 542 (1940).

The starting point for determining congressional intent is the language of the statute itself, *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 508 (1981), giving ordinary meaning to ordinary words. *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975). The term "child support," while perhaps a development of more modern usage, does have an ordinary and commonly understood meaning: monies paid by a parent to another toward the expenses of a child for whom the parent has a legal obligation to provide economic maintenance.[7]

Monies paid on behalf of a child under Title II do not fall within the commonly understood meaning of the term "child support payments." They are not paid by a parent, but by a governmental agency; nor are they contingent upon a legal obligation of a parent to support his or her child. Indeed, children who are owed a duty of support

[7] *See Black's Law Dictionary* 217 (5th Ed. 1979) ("The legal obligation of parents to contribute to the economic maintenance, including education, of their children; enforceable in both civil and criminal contexts. In a dissolution or custody action, money paid by one parent to another toward the expenses of children of the marriage."); *Oran's Dictionary of the Law* 412 (1983) ("Support 1. The obligation to provide for your immediate family. 2. The payments made to a wife, husband, child, etc. (with or without court supervision or formal agreement) to meet the obligation in No. 1.").

may be denied Title II benefits because they cannot meet the "dependency" test (42 U.S.C. § 402(d)(1)). Step-children may qualify for benefits even though the step-parent owes no legal duty of support (42 U.S.C. § 402(d)(4)). Benefits are payable after a parent's duty of support has ceased with the parent's death (42 U.S.C. § 402(d)(1)). And, while the parent may have contributed to the Social Security trust fund from which such benefits are paid, those benefits are also financed, in part, by taxes upon the employer. Title II benefits may provide a degree of economic security to a child when a parent becomes disabled, retires, or dies, and thus make such payments a government "substitute" for child support payments, but they simply do not meet the commonly understood meaning of the term "child support payments."

While it is true that a number of state courts have allowed Title II children's benefits to be credited against a parent's court-ordered child support obligation, such treatment is not universally required as a matter of law. As those cases routinely point out, such allowance is primarily based upon equitable considerations. *See, e.g., Children and Youth Services v. Chorgo*, 341 Pa.Super. 512, 491 A.2d 1374, 1377 (1985) (" . . . the enquiry should be whether it is fair and just that the support obligor be given credit for these benefits."). Some cases emphasize any such allowance is committed to the sound discretion of the trial court. *See, e.g., Chase v. Chase*, 74 Wash.2d 253, 259, 444 P.2d 145, 149 (1968) ("With the husband's disability and consequent loss of employment, the court could, in its discretion, properly treat the social security benefits paid to the wife for the minor child's support as a

contribution by the father toward and deductible from the court-decree support payments. 42 U.S.C. § 402. But this is discretionary and not automatic."); *Hepton v. Hepton*, 25 Wash. App. 229, 231, 605 P.2d 1288, 1289 (1980) (" . . . receipt of social security does not give rise to an automatic reduction of the support payment"). Other state courts have held that Title II benefits do not relieve an obligor of a support obligation, even *pro tanto*, absent a showing of financial inability. *Joachim v. Joachim*, 57 N.Y.AD.2d 546, 547, 393 N.Y.S.2d 63, 64 (1977), *cert. denied*, 434 U.S. 1066 (1978).

There is no generally accepted principle that Title II benefits must be treated as "child support payments." Merely because such benefits are, in some circumstances, considered a substitute for child support payments does not mean that they are "child support payments" as that term is generally understood. In any event, such state cases are of little relevance to the present issue. There is simply no evidence that Congress intended the $50 disregard to be applied on a state-by-state or a case-by-case basis.

Further, there are numerous references throughout Title IV of the Social Security Act to "child support" and consistently the term is used to refer to payments from noncustodial parents pursuant to a legal obligation.[8] As

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[8] *See, e.g.*, 42 U.S.C. § 602(a)(28) ("provide that in determining the amount of aid to which an eligible family is entitled, any portion of the amounts collected in any particular month as child support pursuant to a plan approved under part D, and retained by the state . . . "); 42 U.S.C. § 651 ("For

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"a reflection of practical experience in the interpretation of statutes, a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972).

The distinction between "child support" and social security benefits is also reflected in the family income requirement. In § 2640(a) of DEFRA, establishing the family income requirement, Congress describes payments under Title II as "benefits," not support or child support.[9]

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the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining spousal and child support, assuming that assistance in obtaining support will be available under this part [42 U.S.C. § 651, *et seq.*] to all children . . . "); 42 U.S.C. § 654 ("A state plan for child and spousal support must: "(4) provide that such states will undertake – (a) . . . (b) in the case of any child with respect to whom such assignment is effective . . . to secure support for such child from his parent (or from any other person legally liable for such support. . . .")

See also 42 U.S.C. § 602(a)(27); 42 U.S.C. § 602(a)(31)(D); 42 U.S.C. § 603(b)(2)(c); 42 U.S.C. § 603(a); 42 U.S.C. § 652(a)(1); 42 U.S.C. § 652(a)(7); 42 U.S.C. § 652(a)(10)(C); 42 U.S.C. § 652(b); 42 U.S.C. § 653(c)(1); 42 U.S.C. § 654(6); 42 U.S.C. § 654(19)(A); 42 U.S.C. § 654(19)(B); 42 U.S.C. § 656(b); 42 U.S.C. § 657(a); 42 U.S.C. § 659(a); 42 U.S.C. § 659(b); 42 U.S.C. § 659(d); 42 U.S.C. § 661(b)(3); 42 U.S.C. § 662(b).

[9] "[I]n making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include –

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In contrast, in § 2640(c), establishing the $50 disregard, Congress uses the term "child support payments." The Senate report on the family income requirement describes the prior law as permitting a family "to exclude a child who is receiving *social security or child support*. . . ." S. Rep. No. 169, 98th Cong., 2nd Sess. 980 (Comm. Print 1984) (emphasis added). The Senate report is a clear indication that Congress viewed social security "benefits" and "child support" as distinct.

B.

The Secretary's Interpretation Of The $50 Disregard Is Reasonable And Entitled To Deference

If there exists any ambiguity in the language used by Congress, then resort is properly made to the legislative history of the enactment. *Blum v. Stenson*, 465 U.S. 886 (1984). Unfortunately, the legislative history surrounding the enactment of § 2640(c) of DEFRA reveals little, if anything, as to Congress' intent in establishing a disregard for "child support payments." Neither the House

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(A) any parent of such child, and (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a), if such parent, brother or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j), in the case of *benefits* provided under subchapter II of this chapter). (Emphasis added.)

42 U.S.C. § 602(a)(38)(Supp. III 1985).

Bill nor the Senate Amendment contained any disregard provision. The conference added both the "pass through" and disregard provisions. The only explanation the conference committee provides for such modification is:

> The conference agreement follows the Senate amendment with the following modification. A monthly disregard of $50 of child support received by a family is established. The disregard is applied at eligibility determination and benefit calculation. The provision is effective October 1, 1984.

H.R. Conf. Rep. No. 861, 98th Cong., 2nd Sess. 1407, *reprinted in* 1984 U.S. Code Cong. & Admin. News 697, 1445, 2095. Thus, the conference committee, without mentioning the $50 "pass through" of child support collected by a state IV-D agency, gives no evidence of the purpose or intent in establishing either the $50 "pass through" or the $50 AFDC disregard.

Despite this congressional silence, the court of appeals concluded that Congress' sole intent in adopting the "pass through" and disregard provisions was to ameliorate the seemingly harsh effects of the family income requirement. While that may be one of the effects of the provisions, as noted by this Court in *Bowen v. Gilliard*, 483 U.S. 587 (1987), there is no evidence that Congress was exclusively or even primarily motivated by such concern in their enactment. Indeed, it is important to note that both the "pass through" and disregard provisions benefit families who were not affected by the family income requirement. Prior to Congress' adoption of this requirement in 1984, a custodial parent had the option to exclude from the AFDC unit a child receiving child support or

Title II benefits. For many children receiving child support less than their pro rata share of the AFDC grant, the family was better off including the child in the unit. Eligibility for medicaid benefits may well have made it advantageous for others to have been included. If the purpose of Congress in adopting the "pass through" and disregard provisions was solely to ameliorate the effects of the new *mandatory* requirement, than the families previously opting to include such children were blessed with a windfall, receiving a $50 bonus without suffering any change in their eligibility status. There is no evidence that Congress, in a spending reduction measure, intended such windfall.

The Secretary believes that Congress' primary purpose in enacting the "pass through" and disregard provisions was to provide an incentive for obtaining child support payments from noncustodial parents. There is no evidence in the conference committee report itself, however, that such incentive was the motivation behind the "pass through" or the disregard. In a circumstance such as this, where Congress is silent as to its purpose in enacting legislation, deference to the Secretary's interpretation particularly is warranted, unless that interpretation is clearly unreasonable. Where Congress has not revealed its intent, this Court has held that its is not the function of a court to "substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

It cannot be said that the Secretary's interpretation is unreasonable. Increased child support collections which reimburse the federal treasury and move families off

AFDC, is a goal consistent with a spending reduction measure and reflects Congress' repeatedly expressed concern over the continuing problem of the nonpayment of child support.

That concern was expressed as early as 1972, when Congress began efforts to require states to improve and strengthen their programs for establishing and collecting child support on behalf of AFDC recipients. These efforts culminated in the enactment of Title IV-D of the Social Security Act, Pub. L. No. 93-647, 88 Stat. 2337 (1974). In the intervening years, Congress has continued to strengthen efforts to increase child support collections.[10] On November 4, 1983, Senators Durenberger and Boren introduced Senate Concurrent Resolution 84, which encouraged states to focus on the problems of child custody and child support. Legislation adopting by Congress on August 16, 1984, within weeks after the adoption of DEFRA, revised and strengthened the child support enforcement program and included a Sense of the Congress provision. That provision incorporates Senate Concurrent Resolution 84, and specifically finds "a critical lack of child support enforcement, which Congress has undertaken to address through the child support enforcement program." Pub L. No. 98-378, § 23(a)(2), 98 Stat. 1329 (1984). More recently, the persistence of the problem of child support was recognized:

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[10] Pub. L. No. 97-35, §§ 2331, 95 Stat. 357, 860 (1981) (collection of past due support from federal tax refunds), 2334 (child support obligation assigned to state not released by discharge in bankruptcy), 2335 (intercept of unemployment benefits); Pub. L. No. 97-248, 96 Stat. 324, 401, § 172 (1982) (allotments from pay for child and spousal support owed by a member of uniformed services).

> Why do we have so many children living in poverty? One reason is because such a high percentage of them live with a single parent. In many cases, paternity has never been established, or the absent parent refuses to pay child support that has been ordered by a court. The result is millions of poor children tied to welfare.
>
> If we want to reform the welfare system, let us start with an all-out effort to collect child support.

134 Cong. Rec. S7651 (daily ed. June 13, 1988) (statement of Sen. Bentsen).

Nor is Congress a stranger to the use of financial incentives to encourage the establishment and collection of timely and regular child support payments from noncustodial parents. A similar financial incentive was enacted in 1974 for a 15-month trial period which provided a "pass through" of 40 percent of the first $50 of monthly "child support" payments collected by the state and a subsequent disregard of such amounts in AFDC eligibility determinations. Pub. L. No. 93-647, § 101(a), 88 Stat. 2356 (1974). The purpose of such provision was stated in the legislative history to be an incentive for obtaining child support payments from noncustodial parents. S. Rep. No. 1356, 93d Cong., 2d Sess. 52 (1974).

Given Congress' silence on the intent of the enactment of the "pass through" and disregard provisions in DEFRA, the ordinary usage of the term "child support payments," and Congress' previous use of financial incentives to encourage the establishment and payment

of child support from noncustodial parents, the Secretary's interpretation is clearly not an unreasonable one.

Nor is it unreasonable to distinguish between child support payments from noncustodial parents and Title II social security benefits. The Social Security Administration does not need a financial incentive to provide social security benefits to those who are entitled to them under the law. History has shown, and Congress has recognized, however, that noncustodial parents often do need incentives, both positive and negative, to make timely and regular child support payments. A noncustodial parent, aware that one's children will receive a direct monetary benefit from a support payment, rather than having it retained by the state or be deducted from the AFDC payment, may well be encouraged to make timely payments. Nor is asking a custodial parent to appear before a government official to fill out an application form the same as asking that custodial parent to become involved in judicial proceedings against a former spouse or paramour, including the possibility of being subjected to blood tests and cross-examination by zealous defense attorneys on intimate personal matters.

In a statutory area as complex as the Social Security Act, the Secretary, faced with congressional silence on the intent of its enactment, is in a unique position to discern that intent, in light of experience in the field. That experience and that discernment ought to be given the deference of this Court.

CONCLUSION

The Secretary's reading of the $50 disregard should be upheld, not only as a matter of the deference owed in such case, but because that reading is supported by the commonly understood meaning of the term "child support," Congress' consistent use of that term in accord with that meaning, and the expressed concern by Congress over the continuing problem of nonpayment of child support.

Respectfully submitted,

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February 8, 1990

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QUESTIONS PRESENTED

Whether Title II child dependent benefits are child support within the meaning of 42 U.S.C. Section 602(a)(8)(A)(vi) of the Social Security Act, which requires that the first $50 of "any child support payments" received per month be disregarded in determining eligibility and assistance levels under the Aid to Families with Dependent Children (AFDC) program.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the statutes and regulations cited in the Brief for the Petitioner at 2, 42 U.S.C. Section 602(a)(38), set forth in the Respondents' Appendix, is also involved.

STATEMENT OF THE CASE

In 1984, Congress enacted legislation requiring that the first $50 of any child support payments received by a family be disregarded in determining eligibility and assistance levels under the AFDC program: ". . . the State agency . . . shall disregard the first $50 of any child support payments received in such month . . . ." Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 1146, Section 2640 (c), codified at 42 U.S.C. Section 602(a)(8)(A)(vi).

Contrary to the plain language of the statute, the Secretary of Health and Human Services has refused to apply the disregard to Title II child dependent benefits. The courts below have rejected the Secretary's overly restrictive interpretation of the statute, finding it arbitrary and irrational to read "any child support payments" as excluding Title II child dependent benefits and thereby to apply the $50 disregard to payments from absent, healthy payors, but not to payments from disabled or deceased workers whose child support comes in the form of Title II.

While $50 per month may seem a small sum of money, it is a significant amount to the children of AFDC households. In Virginia, which has established standards of assistance that are neither the highest nor the lowest in the nation, an assistance unit consisting of a custodial parent and two children can receive a maximum AFDC allotment of $265 per month ($354 in a few areas designated as having a high cost-of-living, *e.g.* Alexandria and Arlington County). *See* 45 C.F.R. Section 233.20(a)(2);

Code of Virginia Section 63.1-110. The additional $50 from the disregard represents nearly a 19% increase in monthly income for those families (14% for those in high cost-of-living areas).

A. Statutory Framework

Child dependent payments under Title II of the Social Security Act, 42 U.S.C. Section 401, *et seq.*, were first established under the 1939 amendments to the Act. Ch.666, Section 201, 53 Stat. 1364-1366. The payments are intended to take the place of support that presumably would have been paid by a wage earning parent to a child but for that parent's retirement, death of disability. The primary purpose of the payments is to provide support for dependents of a disabled, retired or deceased wage earner. *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974); *Mathews* v. *Lucas*, 427 U.S. 495, 507 (1976). The payments are not welfare entitlements; rather, they are based on the earnings paid into the trust fund by the parent when he or she was working. *Califano* v. *Boles*, 443 U.S. 282 (1979). A child is eligible for these payments if he or she: (1) is the child of an "insured" individual as defined by the Act; (2) is or was "dependent" on the insured; (3) applies for the payments; (4) is not married; and (5) is either under eighteen years of age, or older than eighteen but still a full-time elementary or secondary school student. 42 U.S.C. Section 402(d). A child is considered "dependent" for the purposes of Title II eligibility if the insured parent was living with the child or contributing to the child's support at the time of death or disability.

Aid to Families with Dependent Children is a joint federal-state public assistance program designed to provide financial assistance to needy and dependent children and to encourage and preserve a family environment, 42 U.S.C. Section 601; *King* v. *Smith*, 392 U.S. 309 (1968). States choosing to participate must establish statewide "standards of assistance" which reflect the minimum dollar amount that, in the state's judgment, an AFDC family requires to meet its subsistence needs. *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974); 45 C.F.R. Section 233.20(a)(2). In determining whether a dependent child is also needy, the state must consider the available income and resources of the child and the custodial parent. 42 U.S.C. Section 602(a)(7)(A); 45 C.F.R. Section 233.20(a)(3)(vi).

Congress changed certain features of the AFDC program when it enacted the Deficit Reduction Act of 1984 (DEFRA), Public Law 98-369, 98 Stat. 494. The three DEFRA amendments to the AFDC program relevant to this case are all contained in a single section of the Spending Reduction Act, Section 2640.

Section 2640(a), codified at 42 U.S.C. Section 602(a)(38), provides that the income of any sibling living in the home of a needy child must be considered in calculating the total income of the assistance unit and determining the AFDC eligibility and benefit level of that needy child. This "mandatory filing unit" or "sibling deeming" provision ended the ability of families to exclude independently supported children from the assistance unit.

Section 2640(b) of DEFRA amended 42 U.S.C. Section 657(b)(1) to require the state to "pass through" to the assistance unit the first $50 of support collected each month by the IV-D agency from non-custodial parents or other persons obligated to pay support to the AFDC recipient. The $50 so distributed does not affect the assistance unit's continued eligibility for AFDC or its benefit amount.

Section 2640(c), DEFRA's "disregard" provision, is specifically at issue in this case. It requires the state, in making eligibility or benefit determinations for an assistance unit, to "disregard the first $50 of any child support payments" received per month for the child or children in the family, "including support payments collected and paid to the family under Section 657(b) of this title." *Id.*, codified at 42 U.S.C. Section 602(a)(8)(A)(vi).

The effect of these amendments on AFDC recipients can be seen in the situation of Geneva Powers, one of the named plaintiffs. Ms. Powers of Tazewell County, Virginia, received a monthly Supplemental Security Income (SSI) check of $336 for a nervous condition at the time suit was filed. She also received AFDC benefits of $207 a month for her daughters Nancy and Loretta Powers and was representative payee for daughter Crystal McClanahan's monthly $254 Title II check drawn on her deceased father's earnings. When Crystal was added to the assistance unit by sibling deeming, the AFDC grant was reduced to $11. Because Crystal's support came from Title II survivors benefits rather than from a living parent's earnings, she would not have been entitled under the Secretary's regulations to a disregard of the first $50 of her monthly check and a consequent increase in household income by that amount. J.A. 54-56.

The constitutionality of the "mandatory filing unit" or "sibling deeming" rule was upheld by this Court in *Bowen* v. *Gilliard*, 483 U.S. 587 (1987). The Court's opinion also stated that the reduction in income experienced by many AFDC families because of sibling deeming was "mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the state must be remitted to the family and not counted as income for the purpose of determining its benefit level." 483 U.S. at 594.

B. Prior Proceedings

This case was filed as a class action by five Virginia families, each of which included children who received AFDC and other children who were independently supported by child support paid through Social Security or other sources. They challenged the Secretary's refusal to apply the statutory $50 disregard to Title II child dependent payments as an alternative to their challenge of DEFRA's "mandatory filing unit" or "sibling deeming" provision. J.A. 18-35.

After cross-motions for summary judgment were filed, the district court on November 17, 1986, stayed further proceedings pending this Court's review of the sibling deeming issue in *Bowen* v. *Gilliard*, 483 U.S. 587 (1987) J.A. 5, 62. Following this Court's decision in *Gilliard*, the respondents/plaintiffs voluntarily dismissed those claims which had been disposed of in that case. They retained their claim that the Secretary's withholding of the disregard from Title II child dependent payments violated both the disregard statute and the Equal Protection Clause. They also retained their sibling deeming claims regarding Title II children. J.A. 6, 64-67.

The district court held on December 21, 1987 that children receiving Title II were subject to sibling deeming. Appendix to Pet. for Cert. at 14a-19a. The court also found that Title II payments were entitled to the $50 disregard, holding that "there is no apparent rational justification" for distinguishing between Title II child dependent payments and child support paid by non-custodial, working parents. *Id.* at 19a-22a. The court rejected the Secretary's contention that the $50 disregard was enacted to provide an incentive for non-custodial parents to make child support payments and therefore did not apply to Title II because there is no action the state

can take to collect such benefits. "No legislative history for Section 602(a)(8)(A)(vi) exists to support the defendants' incentive argument," held the court, which ruled that the purpose of the disregard was to mitigate the family's reduction in benefits, citing *Gilliard*. *Id.* at 20a-21a. Since the Title II children bore the same "burden of change" as AFDC children receiving other forms of child support, they were entitled to the same mitigation. *Id.*

On March 4, 1988 the district court denied the Secretary's motion to alter or amend its decision on the disregard. J.A. 9. In a memorandum opinion, the court rejected his contention that the legislative history of a 1974 disregard provision, in effect for one year for the purpose of encouraging the then-new requirement that AFDC recipients cooperate with the state in the collection of child support payments, provided a rational justification for the Secretary's incentive argument. *Id.* at 23a-27a.

The Secretary appealed from the district court's disregard determination on May 3, 1988 and Respondents cross-appealed on May 13, 1988 on the assistance unit ruling. J.A. 10-11. The Fourth Circuit Court of Appeals affirmed on both issues in an opinion filed March 28, 1989. Cert. Pet. App. at 1a-13a. Finding that the disregard served to mitigate the effect of the sibling deeming, the court held that the Secretary's refusal to apply the disregard to Title II child dependent payments was based on an impermissible interpretation of the statute. *Id.* at 8a-13a. The court rejected the Secretary's incentive argument, noting that there was no legislative history for the present statute to support such a rationale and that the 1974 legislative history was inapplicable. "It is axiomatic that the intent of one Congress cannot be inferred from

the activities of another Congress." *Id.* at 9a. The court went on to observe:

> We perceive no distinction between support derived directly from a father's wages and support provided indirectly through Title II payments. In both cases, it is the father, a wage earner, whether current or past, who provided the support. The money to support the child comes directly through the father or indirectly through insurance he earned when working. In each instance the $50 disregard would serve the purpose the Supreme Court identified in *Gilliard*, 107 S. Ct. at 3013.

Id. at 11a. The court decided the issue solely on the basis of statutory construction, but noted that the Secretary's disparate treatment of the two classes of child support recipients raised equal protection concerns as well. *Id.* at 11a-12a.

On May 31, 1989, the Fourth Circuit denied the Secretary's petition for rehearing and suggestion for rehearing *en banc*. J.A. 16.

SUMMARY OF ARGUMENT

The $50 disregard provision of DEFRA was enacted by Congress to "mitigate somewhat" the financial hardship that befell AFDC families by DEFRA's sibling deeming provision. *Bowen* v. *Gilliard*, 483 U.S. at 594. The provision on its face applies to "any child support payments . . . (including support payments collected and paid to the family under Section 657 [sic] of this title)." The Secretary, however, seeks to convince this Court that Congress, in choosing this language, intended to exclude from the disregard's application an entire category of child support payments of which it was acutely aware: the fifty year old Title II child dependent payments program. Employing elaborate, non-textual aids to construction, he portrays

the term "child support" as a technical term of art which cannot be construed as its ordinary meaning would suggest.

The best indication of congressional intent is the statutory text itself. "Any" has long been construed in the broadest, most inclusive terms possible. *All* forms of child support qualify for the disregard under this language. The "including" parenthetical indicates that payments collected by state IV-D agencies are only part of the wider set of child support payments subject to the disregard. However, the Secretary narrowly construes this language in direct derogation of its plain meaning to encompass virtually no other child support payments except those passing through the IV-D system. The Secretary seizes upon language added to the disregard by the Family Support Act of 1988 to justify his narrow construction, but those amendments have no relevance one way or the other to the issues in this case.

Because of the broad sweep of the statutory language, the Secretary's interpretation can only prevail if it is determined that Title II child dependent payments are not "child support" at all. However, Title II is almost universally regarded as child support; indeed the sole purpose of the checks is to support children. Noting the purpose of Congress in establishing this program in 1939, this Court has always recognized the support character of these payments. The Secretary concedes that the payments are generally viewed as child support but attempts to justify his policy by relying on strained, technical distinctions between Title II child dependent payments and other forms of child support. The distinctions he draws, however, only highlight the fact that he himself has no definition of child support to offer. He instead conjures a

vague, ephemeral "essence of child support" which defies accurate description and renders his distinctions absurd.

As this Court observed in *Gilliard*, 483 U.S. at 594, the legislative history of the disregard provision strongly suggests that it was enacted to mitigate the effects of sibling deeming, with which it is chronologically and conceptually linked. Secretary Heckler proposed the sibling deeming concept in a legislative package submitted to Congress in 1982. The provision passed the Senate but died in the House. A second proposal met a similar fate in 1983. In 1984 the Senate passed the provision a third time; it was approved in Conference Committee only after the disregard provision was accepted.

The Secretary, however, seems to be unable to accept that the legislative package was not enacted as proposed. He draws upon the legislative history of a completely unrelated disregard statute which expired ten years ago to make the claim that the present disregard was enacted not to mitigate but to provide an incentive for absent parents to make payments to the IV-D agency. He also seeks to draw this conclusion from the legislative history of the 1984 Child Support Enforcement Amendments which were enacted after DEFRA. Pub. L. 98-378, 98 Stat. 1321 (1988). His analysis, however, is patently erroneous and contrary to basic principles of statutory construction.

The Secretary's failure to apply the disregard statute in accordance with its plain language and mitigating purpose leads him to bizarre results such as allowing the disregard for certain spousal support payments while denying the disregard for Title II. His interpretation of this statute has been irrational and inconsistent as well as contrary to the clear congressional intent and should not be deferred to.

ARGUMENT

THE SECRETARY'S REFUSAL TO APPLY THE BENEFITS OF DEFRA'S DISREGARD PROVISION TO CHILDREN RECEIVING TITLE II CHILD DEPENDENT PAYMENTS VIOLATES 42 U.S.C. SECTION 602(a)(8)(A)(vi).

The Secretary seeks to convince this Court that a disregard provision applying on its face to "any child support payments" somehow does not apply to Title II child dependent payments, the sole purpose of which is to support children. Straining to create ambiguity where none exists in order to invite deference to his position, he cites the legislative histories of statutes that expired more than a decade ago and uses other elaborate, non-textual aids to construction in the hope that the term "child support" will be seen as some technical term of art, to be construed in a way other than common sense and ordinary usage would dictate. However, his baroque approach to statutory construction does not withstand scrutiny.

Review of the Secretary's interpretation begins with a determination, using traditional tools of statutory construction, of whether Congress has spoken directly to the precise question at issue. *N.L.R.B.* v. *United Food and Commercial Workers Union*, 484 U.S. 112 (1987); *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The precise question at issue in this case is: whether Congress, in using the phrase "any child support payments," intended to exclude child dependent payments made under Title II of the Social Security Act from the application of the $50 disregard.

If the intent of Congress on this issue can be determined after a review of the statute's language, structure and legislative history, "that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. *See also*

Dole v. *United Steelworkers*, ___ U.S. ___, 58 U.S.L.W. 4200 (1990); *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421, 440-445 (1987). If congressional intent cannot be determined, that is, if the statute is found to be ambiguous or silent on the question at issue, the inquiry becomes whether the Secretary's interpretation is rational and consistent with a permissible reading of the statute and therefore entitled to deference. *Chevron*, 467 U.S. at 844-845. *See also Sullivan* v. *Zebley*, ___ U.S. ___, 58 U.S.L.W. 4177 (1990).

Congress's intent in this instance can be determined unqualifiedly from the text of the statute itself. Utilization of other traditional tools of statutory construction to discern the structure and purpose of the statute only confirms what the words plainly say: that "any child support payments" are to be accorded disregard treatment. Title II child dependent payments were not intended to be excluded.

A. The Secretary's Narrow Application Of The Disregard Contradicts The Plain Meaning Of The Statutory Language.

The best source for determining the intent of Congress is the text of the statute itself. ". . . (O)ur starting point must be the language employed by Congress . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *I.N.S.* v. *Phinpathya*, 464 U.S. 183, 189 (1984) (internal quotation marks omitted). *See also Dole* v. *United Steelworkers*, 58 U.S.L.W. at 4202. The AFDC disregard provision as originally enacted in DEFRA, Pub. L. No. 98-369, Section 2640(c), 98 Stat. 1146 (1984) stated:

> [I]n making the [AFDC eligibility and assistance] determination under paragraph (7), the State agency

* * *

> (vi) shall disregard the first $50 of *any* child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (*including* support payments collected and paid to the family under Section 657(b) of this title). (Emphasis added).

The plain language of the section makes no distinction among classes of child support payments that trigger or do not trigger the disregard—"*any* child support payment" (emphasis added) qualifies for a disregard. "Any" has long been construed by this Court in the broadest, most inclusive terms possible. *See, e.g., Johnson* v. *Southern Pacific Co.*, 196 U.S. 1, 16 (1904) ("any car" in railroad safety statute held to apply to "all kinds of cars running on the rails, including locomotives."); *United States* v. *Rosenwasser*, 323 U.S. 360, 362-363 (1945) ("A broader or more comprehensive coverage . . . would be difficult to frame."); *International Union of Operating Engineers* v. *Flair Builders*, 406 U.S. 487, 491 (1972) ("There is nothing to limit the sweep of this language. . . .").

More recently, in *United States* v. *James*, 478 U.S. 597 (1986), a provision of the Flood Control Act that "no liability of any kind" could attach to the United States for "any damage from or by flood waters at any place" was held to bar recovery under the Federal Tort Claims Act. Justice Powell wrote for the majority at 478 U.S. 597, 604-605:

> It is difficult to imagine broader language. . . . Given the nature of the accidents at issue and given the plain terms of the statute, "it requires some ingenuity to create ambiguity" (Citations omitted). . . . Moreover, Congress's choice of the language "*any* damage" and "liability of *any* kind" further undercuts a narrow construction. (Emphasis supplied in text).

"Any" was construed in the context of the AFDC program in *Shea* v. *Vialpando*, 416 U.S. 251 (1974). Justice Powell wrote for a unanimous Court:

> By its terms, Section 402(a)(7) [42 U.S.C. 602(a)(7)] requires the consideration of "any" reasonable work expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term "any," we read this language as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income. Accordingly, a fixed work-expense allowance which does not permit deductions for expenses in excess of that standard is directly contrary to the language of the statute.

416 U.S. at 260.

Clearly, the word "any" modifying "child support payments" in Section 602(a)(8)(A)(vi) signifies Congress's intent to apply the $50 disregard to all forms of child support received by the AFDC family for the use and benefit of dependent children.

The reach of the disregard is not limited in any way by the parenthetical "including" clause at the conclusion of the section. On the contrary, this language indicates unequivocally that Congress intended those support payments collected by the IV-D agency and passed through to the family to be only a part of the wider universe of child support payments subject to disregard treatment. *See* Sands, 2A *Sutherland Statutory Construction*, (4th Ed. 1985), Section 47.07 at 133; *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933) (". . . 'include' is . . . used as a word of extension or enlargement rather than as one of

limitation or enumeration"); *Federal Land Bank* v. *Bismark Lumber Co.*, 314 U.S. 95, 100-101 (1941) (". . . term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"). The Secretary's suggestion that the "including" parenthetical's reference to the pass-through provision somehow limits the scope of "any child support payments" and that it is "reasonable" to assume that the disregard section and the pass-through section are referring to the same kind of child support payments, Brief at Pet. at 18, is simply at odds with what the statute plainly says.

The Secretary makes much of the 1988 Family Support Act which inserted additional language into the disregard and pass-through provisions, Pub. L. No. 100-485, 102 Stat. 2346, Section 102(a) (to be codified at 42 U.S.C. Section 602(a)(8)(A)(vi)) and Section 102(b) (to be codified at 42 U.S.C. Section 657 (b)(1)). The disregard as amended requires that the state agency

> (vi) shall disregard the first $50 of any child support payments *for such month* received in that month, *and the first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due*, with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title). (Emphasis added to language inserted by the amendment).

The language added to the pass-through provision was similar. *See* Brief of Pet. at 3. The Secretary seeks to draw an inference from the reference to "absent parent" that Congress never intended the disregard to apply to Title II child dependent payments and that "child support payments" therefore refers only to support paid by a currently working absent parent into the IV-D agency. *Id.* at 15-18.

Such an inference is untenable given the fact that the amendments left unchanged the operative language "any child support payments" and the "including" parenthetical. As the Secretary himself admits, *Id.* at 16 n.14, the added language only addresses the issue of how *many* disregards an AFDC household can claim if an absent parent misses payments for several months and then cures the arrearage with one large payment. The statute now makes clear that households in such circumstances are entitled to a single $50 disregard, not to multiple disregards. This is not a scenario that is limited to IV-D payments. The amendments can also apply to retroactive Title II payments for the months between application for Title II and approval of entitlement that are received by an AFDC household. Those payments would also receive a single $50 disregard.

There is nothing in the added language or in the legislative history of the amendments to indicate that Congress was in any way attempting to limit the meaning of "any child support payments" or narrow the broad applicability of the disregard. Indeed, the Senate Committee Report specified: "(the Committee) does not intend that an inference should be drawn from the enactment of this provision or its effective date as to the meaning of the law as previously in effect."[1] S. Rep. No. 377,

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[1] The Secretary himself notes at Brief of Pet. 16 n.14 that this language is a reference to the issues litigated in *Wilcox* v. *Ives*, 864 F.2d 915, 926 (1st Cir. 1988) (finding that the disregard and pass-throughs provisions as originally enacted required separate pass-throughs and disregards for multiple payments); 864 F.2d at 926 (Breyer, J. concurring) (noting that the 1988 amendments adopted the

100th Cong., 2d Sess. 17 (1988). The retention of the "including" parenthetical and the phrase "any child support payments" undercuts rather than supports the Secretary's interpretation.

It is a well-established canon of statutory construction that effect be given to all the words used by Congress. *See, e.g., Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 633 (1973). However, in creating his narrow interpretation, the Secretary carefully reads the word "any" out of the disregard section altogether and construes "including" as a term of limitation rather than as a term of extension or enlargement. Congress's intent, as deduced from the language it chose to enact, was that the disregard be applied as broadly, not as narrowly, as possible.

B. Title II Child Dependent Payments Are "Child Support Payments" Within The Broad Ambit Of The Statute.

Given the broad sweep of the statutory language, the Secretary can only avoid applying the disregard to Title II child dependent benefits by asserting that such benefits are not really "child support payments" at all. However, this assertion is undercut by the very HHS Departmental

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Secretary's view for the future). Prior to the 1988 amendments, every court that had considered the multiple pass-through/disregard issue had ruled against the Secretary and found that a disregard for each monthly payment was required by the plain statutory language. *See, e.g., Beasley* v. *Harris*, 671 F.Supp. 911 (D. Conn. 1987); *Humble* v. *Department of Public Aid*, 165 Ill. App.3d 624, 116 Ill. Dec. 509, 519 N.E.2d 99 (1988); *Vanscoter* v. *Bowen*, No. C86-1568WD (W.D. Wash. July 15, 1988). The attention of Congress clearly was directed to the issues raised in these cases when it enacted the 1988 amendments, not to the entirely different issue of the disregard's applicability to Title II child dependent payments.

Appeals Board decision he lodged with this Court as illustrative of his interpretation of DEFRA. *See Georgia Department of Human Resources*, Docket No. 88-40, Dec. No. 995 (November 4, 1988). In upholding the Family Support Administration's disallowance of the state agency's claim for corrective payments which it made pursuant to orders from Georgia courts to apply the disregard to Title II payments, the Board concluded "that *while these benefits might be viewed generally as child support*, FSA reasonably determined that they did not fall within the *narrower* concept of the Act." *Id.* at 1 (emphasis added). The Secretary again chooses not to read all the words of the statute and arbitrarily limits the disregard to IV-D pass-through payments.

Title II child dependent payments are "generally viewed as child support" because that is exactly what they are. They are payments made to children whose parents are disabled, aged or deceased wage earners. 42 U.S.C. Section 402(d). These payments are based on the wages earned by the parents when they were working, and are to be used exclusively for the support and maintenance of those children. 42 U.S.C. Section 405(j); 20 C.F.R. Section 404.2035. In fact, a representative payee for a child receiving Title II who does not use the payments solely for the support of that child is subject to criminal penalties of up to five years imprisonment and a $5,000 fine. 42 U.S.C. Section 408(e). *See also* 20 C.F.R. Section 404.2041.

First established under the 1939 amendments to the Social Security Act for the minor children of retired or deceased workers, Pub. L. 76-379, 53 Stat. 1362, Title II child dependent payments were intended as support from their inception. As stated in the House Committee Report, "The purpose of these child's benefits is to assure

the child of a monthly amount based on the wages of the parent or the deceased parent." H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939), *reprinted in* 84 Cong. Rec. 6722 (June 6, 1939). The changes in the Act creating the benefits were "designed to afford more adequate protection to the family as a whole" and to "pay benefits in accordance with the probable needs of the beneficiaries." *Id.* at 6713.

The 1958 amendments to the Social Security Act extended Title II to the dependents of an insured worker who becomes disabled and entitled to disability insurance benefits. Pub. L. 85-840, 84th Cong. 2d Sess. The comments of the House Committee at that time clearly reveal the intended purpose of the benefits, i.e., to support children:

> In providing monthly benefits for the dependents of workers entitled to disability insurance benefits, your committee has given recognition to the problems confronting families whose breadwinners have been forced to stop work because of total disability. The benefit amount payable to the disabled worker under the present disability insurance provisions does not provide adequate protection for his family. The needs of the family of a disability insurance beneficiary are as great as, or greater than, the needs of the family of an old-age insurance beneficiary.

H.R. Rep. No. 2288, 85th Cong. 2d Sess. 12 (1958). *See also* S. Rep. No. 404, 89th Cong., 1st Sess., 110 (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 2050 (program intended to "pay benefits to replace the support lost by a child when his father retires, dies or becomes disabled").

In light of such clearly expressed congressional purpose, this Court has always recognized the support character of these payments. "As we have noted, the

primary purpose of the . . . Social Security scheme is to provide support for dependents of a disabled wage earner." *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974). The payments have been described as "attempts to obviate, through a program of forced savings, the economic dislocations that may otherwise accompany old age, disability, or the death of a breadwinner." *Califano* v. *Boles*, 443 U.S. 282, 283 (1979). Because the payments are based on the earnings contributed by the retired, deceased or disabled parents, the Court has frequently noted that they are not welfare benefits:

> The old-age and disability insurance aspects of the Social Security system do not purport to be general public assistance laws that simply pay money to those who need it most. That was not the predominant purpose of these benefit provisions when they were enacted or when they were amended. Rather, the primary objective was to provide workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age.

Mathews v. *DeCastro*, 429 U.S. 181, 185-186 (1976). *See also Mathews* v. *Lucas*, 427 U.S. at 507 (statute not a general welfare provision, but designed to replace support).

Congress did not include a definition of "child support" in the disregard enactment. In the absence of a congressionally supplied definition, this Court has looked to the common understanding of the language used and has presumed that Congress chose to give ordinary meaning to ordinary words. *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975). The Secretary purports to find this "ordinary meaning" at *Black's Law Dictionary* 217 (5th Ed. 1979), which defines "child support" in terms of a "legal obligation" to contribute to a child's economic maintenance. Brief of Pet. at 13, n.9. However, this Court has tradi-

tionally turned to authorities of general reference, not to legal dictionaries, to find "ordinary meaning to ordinary words." *See*, e.g. *Sullivan* v. *Everhart*, ___ U.S. ___, 58 U.S.L.W. 4215, 4217 (1990). "Support" is defined at *Webster's Third New International Dictionary* 2297 (Unabridged, 1981) as "a means of livelihood, sustenance or existence, . . . a person or agency that furnishes support." *Random House Dictionary of the English Language* 358 (Unabridged, 2d Ed. 1987) defines "child support" as "money paid for the care of one's minor child, especially payments to a divorced spouse or a guardian under a decree of divorce." There is nothing contained in these day-to-day definitions that would support the Secretary's contention that Title II child dependent payments are not child support.

No substantive body of federal law reflecting a generally agreed upon definition for the term "child support" exists. Of course, the courts of the fifty states deal with this term on a regular basis, making reference to state law for the purpose of discerning a common definition, if any, appropriate. It should be presumed that when Congress uses words of accumulated and settled meaning, it means to incorporate the established meaning of such terms, *see Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979).

An overwhelming number of state courts that have considered the nature of Social Security children's benefits have concluded that they are a form of insurance, earned by the worker and directly attributable to his participation in the work force. Once this characterization is accepted, the benefits are seen not as some gratuity but as a product of the parent's labor that should be credited against any support obligation. At least seventeen states credit such payments against the support obligation automatically.[2] At least another ten states allow discretionary credit against the obligation on a case-by-case basis—not because of any lack of recognition that these payments are child support, but rather out of a concern that an automatic credit against a support obligation would constitute a unilateral modification affecting the integrity of the support decree.[3]

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[2] ALABAMA: *Binns* v. *Maddox*, 57 Ala. App. 230, 327 So.2d 726 (1976) (disability); *Bowden* v. *Bowden*, 426 So.2d 448 (Ala. Ct. App. 1983) (death benefits). ARIZONA: *Lopez* v. *Lopez*, 125 Ariz. 309, 609 P.2d 579 (Ct. App. 1980) (retirement benefits). ARKANSAS: *Cash* v. *Cash*, 234 Ark. 603, 353 S.W.2d 348 (1962) (retirement benefits). COLORADO: *Meek* v. *Meek*, 669 P.2d 628 (Colo. Ct. App. 1983). GEORGIA: *Perteet* v. *Sumner*, 246 Ga. 182, 269 S.E.2d 453 (1980) (disability). IOWA: *Potts* v. *Potts*, 240 N.W.2d 680 (Sup.Ct. Iowa 1976). KANSAS: *Andler* v. *Andler*, 217 Kan. 539, 538 P.2d 649 (1975) (disability). KENTUCKY: *Board* v. *Board*, 690 S.W.2d 380 (Ky. 1985) (death benefits). LOUISIANA: *Folds* v. *Lebert*, 420 So.2d 715 (La. Ct. App. 1982) (disability). MASSACHUSETTS: *Cohen* v. *Murphy*, 368 Mass. 144, 330 N.E.2d 473 (1975) (disability). MISSISSIPPI: *Mooneyham* v. *Mooneyham*, 420 So.2d 1072 (Sup.Ct. Miss. 1982) (disability). NEBRASKA: *Shulze* v. *Jensen*, 191 Neb., 253, 214 N.W.2d 591 (1974) (disability). *Lainson* v. *Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985) (disability). NEW JERSEY: *Potter* v. *Potter*, 169 N.J. Super. 140, 404 A.2d 352 (App. Div. 1979). NEW MEXICO: *Mask* v. *Mask*, 95 N.M. 229, 620 P.2d 883 (1980) (retirement). *Romero* v. *Romero*, 101 N.M. 345, 682 P.2d 201 (Ct. App. 1984) (disability). PENNSYLVANIA: *Children & Youth Servs.* v. *Chango*, 341 Pa. Super. 512, 491 A.2d 1374 (1985) (disability). SOUTH CAROLINA: *Justice* v. *Scruggs*, 286 S.C. 129, 332 S.E.2d 106 (S.C. 1985) (disability). VERMONT: *Davis* v. *Davis*, 141 Vt. 398, 449 A.2d 947 (1982) (disability).

[3] CONNECTICUT: *Fowler* v. *Fowler*, 156 Conn. 569, 244 A.2d 375 (1968) (disability). ILLINOIS: *Nakaerts* v. *Nakaerts*, 106 Ill. App. 3d 166, 435 N.E.2d 791 (1982) (death benefits). INDIANA: *Brummett* v. *Brummett*, 472 N.E.2d 616 (Ind. Ct. App. 1984) (survivor's benefits). MICHIGAN: *Gibson* v. *Gibson*, 110 Mich. App. 666, 313 N.W.2d 179

In an attempt to refute the enormous body of authority indicating that Title II child dependent payments are child support, the Secretary cites to twenty-two references to "child support" and "child or spousal support" in Title IV of the Social Security Act. Brief of Pet. at 13. In each instance, he asserts, the reference is to payments from absent parents, not to Title II Social Security. However, the Secretary's examples beg the question, for each citation is to a section of the Act dealing with some aspect or other of the IV-D collection system. The IV-D system was established to collect support payments from working, non-custodial parents. Under Section 2640(b) of DEFRA, 42 U.S.C. Section 657(b)(1), $50 of the support so collected is "passed through" to the AFDC family per month; under DEFRA Section 2640(c), 42 U.S.C. Section 602(a)(8)(A)(vi), that $50 is disregarded. Naturally, none of the references to "child support" in the cited sections would be to Title II, because Title II is not routed through the IV-D system. That does not matter, however, because the disregard statute plainly states that payments to IV-D agencies pursuant to 42 U.S.C. Section 657(b)(1) are only one type, not the only type, of all the forms of child support which qualify for the disregard. The Secretary's citations demonstrate nothing other than his convoluted, circular, extra-textual approach to statutory construction.

(1981) (death benefits). MINNESOTA: *In re Haynes*, 343 N.W.2d 679 (Minn. Ct. App. 1984) (retirement benefits). MISSOURI: *Craver* v. *Craver*, 649 S.W.2d 440 (Sup.Ct. Mo. 1983) (in dicta). NEW HAMPSHIRE: *Griffin* v. *Avery*, 120 N.H. 783, 424 A.2d 175 (1980) (disability). NEW YORK: *Passaro* v. *Passaro*, 92 A.D.2d 861, 459 N.Y.S.2d 839 (1983) (disability). OKLAHOMA: *Nibs* v. *Nibs*, 625 P.2d 1256 (Sup.Ct. Okla. 1981) (disability). WASHINGTON: *Chase* v. *Chase*, 74 Wash. 2d 253, 444 P.2d 145 (1968) (disability).

One of the citations is nevertheless of some interest, because it contains the Social Security Act's only definition of "child support." 42 U.S.C. Section 662(b). The definition is limited to "the purposes of section 659 of this title" (which concerns the enforcement of an individual's legal obligation to provide child support or alimony) and is therefore inapplicable to the disregard provision, but it shows that Congress thought of "child support" in the broadest possible terms:

> (b) The term "child support", when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which such individual has such an obligation, and (subject to and in accordance with State law) includes but is not limited to, payments to provide for health care, education, recreation, clothing, or to meet other specific needs of such a child or children; such terms also includes attorney's fees, interest, and court costs, when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction.

Title II child dependent payments were created in 1939 for the sole purpose of providing support for children. Congress has amended the program numerous times during the past fifty years, each time with the intention of further advancing this stated purpose. The ordinary meaning of the term "child support" encompasses Title II child dependent payments. Such payments are overwhelmingly recognized as child support by the states. There is nothing in the statutory scheme of the AFDC program and the Social Security Act that would suggest that these payments are not child support. Clearly, the

disregard statute's broad application to "any child support payments" would include Title II.

C. The Secretary Contrives Artificial Distinctions Between Title II Child Dependent Payments And Other Forms Of Child Support To Justify His Interpretation Of The Disregard Statute.

Despite the plain statutory language applying the disregard to "any child support payments" and the nearly universal recognition of Title II child dependent payments as child support, the Secretary presents a series of strained technical distinctions between support provided directly from an absent, working parent's wages and support provided indirectly through Title II that he claims justifies differential treatment. Brief of Pet. at 13-18, 27.

What is most revealing about the Secretary's purported distinctions is that they are not based on any definition of "child support" that he himself offers. Instead, working from the *Black's Law Dictionary* definition discussed *supra*, he conjures a vague, ephemeral "essence of child support" that seems to consist of some sort of legal obligation (he does not say what) and a requirement that the parent payor be simultaneously healthy, absent from the home and gainfully employed (he does not say why). Many of the courts which have considered the disregard's applicability to Title II[4] have noted this deficiency, but

[4] The following courts have held that the disregard should be applied to Title II: *Brown* v. *McMahon*, 722 F.Supp. 1573 (E.D. Cal. 1989) (reprinted in Respondents' Brief in Opp. to Pet. for Cert. in appendix); *Jackson by Forrest* v. *Mullany*, 708 F.Supp. 483 (N.D.N.Y. 1989); *D'Antignac* v. *Perales*, No. 16444-86 (N.Y.Sup.Ct. App. Div. May 9, 1988); *McBee* v. *Sallee*, No. 2-86-103 (E.D. Tenn. Nov. 26, 1986); *Davis* v. *Sallee*, No. 4-86-27 (E.D. Tenn. Oct. 10, 1986); and *Ledbetter* v. *Foster*, 180 Ga. App. 696, 350 S.E.2d 31 (1986).

The following courts have held that the disregard does not apply to Title II: *Baylor* v. *New Jersey Dept. of Soc. Serv.*, 235 N.J. Super 22, 561 A.2d 618 (1989); *Todd* v. *Norman*, 840 F.2d 608 (8th Cir. 1988).

few have summarized the problem as cogently as Chief Judge Lay in his dissent in *Todd* v. *Norman*, 840 F.2d 608, 614 (8th Cir. 1988):

> The Secretary has never promulgated a definition of the term "child support payments" that would exclude social security child's insurance benefits, and no evidence has been presented to demonstrate that the agencies previously addressed the question presented in this law suit. The agencies involved in this case should not be accorded deference because the agencies' interpretation has neither been consistent nor long standing (citation omitted), but rather is an ad hoc response to litigation.

The first distinction offered by the Secretary is that while "parental child support payments" as he calls them are "dependent on the resources and compliance of an absent parent," Title II payments are "paid and guaranteed by the federal government." This argument, of course, ignores some central features of Title II—that the payments are drawn from earnings that were paid into a trust fund while the insured was working, and that the amount of the payments varies with the amount paid into the fund. 42 U.S.C. Section 401-433. Title II payments are not welfare entitlements, as the Secretary implies. *See Califano* v. *Boles; Mathews* v. *DeCastro; Mathews* v. *Lucas*, cited *supra* at 19. Whether the payment is called "parental child support" or Title II child dependent benefits, the ultimate *source* is precisely the same: parental earnings. More importantly, the *purpose* of the funds and the use to which they are put is precisely the same in either instance: the support and maintenance of a child. This Court rejected the same kind of form-over-function approach being advocated by the Secretary in *Rose* v. *Rose*, 481 U.S. 619 (1987). In *Rose*, it was held that a state court could attach veteran's benefits to satisfy a child support obligation. It was reasoned that funds paid to a

disabled father in the form of such benefits were a source of child support even though they emanated from a government benefits program rather than from the father's current earnings.

The Secretary also seems to be saying that Title II payments somehow lose their character as child support because they are not paid through an act of volition but rather arrive automatically every month. However, current wage earners are often required to pay support through intermediary sources as when courts enter mandatory wage assignment orders. In fact, the Family Support Act of 1988 will soon require that *all* IV-D agency collections be accomplished through immediate wage withholding. Pub. L. No. 100-485, Section 101(a), Codified at 42 U.S.C. Section 666(b)(3). Then, both the "parental support" payor and the disabled insured parent will be considered to be making child support payments even though neither one will be paying directly and neither one will have control over the delivery of payments.

The Secretary's "essence of child support" also appears to require the existence of a legal obligation. He notes that the largest number of Title II child dependent payment recipients consists of children of deceased parents, as in fact are two of the named plaintiffs, Crystal McClanahan and Robert Turner. Brief of Pet. at 28. He asserts that for such children, there is no outstanding child support obligation for the payor parent at all, and that therefore the payments they receive are something other than child support.

The Secretary's thesis is of course derived from the *Black's Law Dictionary* definition of child support discussed *supra*, not from the ordinary meaning of the term. He forgets that both Congress and this Court have

characterized Title II payments as child support regardless of whether the parent payor is disabled, retired or deceased. *See*, e.g. *Mathews* v. *Lucas*, 427 U.S. at 507. His thesis also fails because, even in his own limited view of what can be called child support, existence of an established legal obligation is not essential. Under his regulations, the first $50 of voluntary support payments received by an AFDC family in a month are disregarded, 45 C.F.R. 303.80(a), even though the payments are received directly by the family and no obligation to pay support has been established.

Moreover, Title II eligibility is grounded on a finding that the child is or was dependent upon the insured, that is, that the child was living with the insured or being supported by the insured at the time of death or disability. The numerous criteria for dependency established by Congress all hark back either to a past legal obligation to support or to an obligation which could have been formalized legally and was observed in fact. *See*, e.g. 42 U.S.C. Sections 402(d)(1)-(4).

The Secretary further posits that Title II child dependent payments cannot be child support for the purposes of AFDC because of the program's requirement that all support rights be assigned to the state IV-D agency. 402 U.S.C. Section 602(a)(26)(A) and (B). Title II payments are not assignable. 42 U.S.C. Section 407. However, this does not pose any barrier to the application of the disregard. A custodial parent receiving Title II child dependent payments for one of her children and applying the AFDC for the family unit would assign the family's right of support to the state in order to meet eligibility and cooperation requirements. The child's Title II payments are not assignable for collection, so the custodial parent would continue to receive these support payments

directly and the IV-D agency would not collect or distribute them. The parent would report this and all other income received to the state welfare agency, which, after applying the disregard, would count the Title II payment as income in computing the family's grant. 45 C.F.R. Section 233.20(a)(3)(v)(B). The funds in fact would be treated exactly like the voluntary payments which already receive disregard treatment under the Secretary's regulations. 45 C.F.R. Section 303.80(a).

Another assertion made by the Secretary is that the amount of the Title II payments is based solely on the level of earnings paid by the insured into the trust fund and not on any consideration of the actual need of the child. "Parental child support payments" are based in part on a determination of need, he argues, citing H. Krause, *Child Support in America* 18 (1981). However, this citation is out of date. Pursuant to the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1321, states are required to establish child support guidelines. In Virginia, a support award is calculated after determining the parents' combined gross monthly income, determining from that figure using a grid prepared by the state their combined monthly support obligation for the number of children involved, and setting the non-custodial parent's obligation as a percentage of that combined monthly support obligation, such percentage being the percentage of the combined gross income that is made up by that parent's income. *See* e.g. Code of Virginia Section 20-108.2. There is no individualized determination of need—the support figure is computed from parental income only. Under the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, use of these guidelines became presumptive in all states as of October 1989.

The Secretary's so-called "distinctions" are artificial and strained. He can only exclude Title II payments from the disregard's application by using the narrow, formalistic analysis of *Georgia Department of Human Services*, *supra*, which is clearly at odds with the legislative purpose of Title II and the plain meaning of DEFRA's statutory language.

D. The Secretary's Denial Of The Mitigating Purpose Of The Disregard Statute Is Premised On the Legislative Histories Of Previous And Unrelated Statutes.

In upholding the constitutionality of the DEFRA amendment to the AFDC program establishing the "sibling deeming" or "mandatory filing" rule, *Bowen* v. *Gilliard*, this Court stated concerning the $50 disregard:

> Because the 1984 amendments forced families to include in the filing unit children for whom support payments were being received, the practical effect was that many families' total income was reduced. The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the State must be remitted to the family and not counted as income for the purpose of determining its benefits level. (footnotes omitted).

483 U.S. at 594. The Court may have made this observation partially at the prompting of the Secretary, who had argued in brief that the disregard had been enacted to "mitigate the potential disadvantage" inherent in the fact "that the child support assigned to the state in consequence of the new filing-unit provision might sometimes be greater than the marginal increase in AFDC benefits obtained by the family in filing as a larger unit." Brief for the Federal Appellant, *Bowen* v. *Gilliard*, No. 86-509, *Gilliard* v. *Bowen*, No. 86-564 (October Term 1986) at 14.

The legislative history of the disregard provision shows that it came about as a result of a House-Senate compromise that enabled the sibling deeming provision to be enacted. The context of the disregard's passage strongly suggests that its primary purpose was to lessen the impact of sibling deeming on the affected families.

The Secretary, however, is now asserting to this Court that the primary purpose for the disregard is not mitigation at all, but rather to provide an incentive to encourage cooperation by the custodial AFDC parent in obtaining child support payments from the absent parent. Using this rationale, the Secretary posits that Congress could not have logically intended the disregard to apply to Title II payments because the incentive element would be lacking due to the automatic delivery of such payments. However, there is nothing in the legislative history to even suggest that Congress intended the disregard to serve an incentive purpose. What the Secretary really wishes to do is to apply the DEFRA AFDC amendments as they were originally proposed to Congress rather than as they were finally enacted. The Secretary therefore relies on the legislative histories of completely unrelated statutes and enactments that expired more than a decade ago.

The "sibling deeming" or "mandatory filing" rule, DEFRA Section 2640(a), codified at 42 U.S.C. Section 602(a)(38), and the $50 disregard provision, DEFRA Section 2640(c), codified at 42 U.S.C. Section 602(a)(8)(A)(vi), are chronologically and conceptually linked. Sibling deeming was first proposed to Congress by then-Secretary Margaret Heckler in 1982. The House and Senate Committees described the proposed measure as a provision to "(i)nclude all minor children in the AFDC unit, except for disabled children receiving SSI." S. Print No. 97-11, Senate Comm. on Finance, 97th Cong., 2d Sess.

41, Data and Materials for the Fiscal Year 1983 Finance Committee Report under the Congressional Budget Act (February 1982). It was recognized that under the Secretary's proposal, children to be included would "most commonly" be those "receiving Social Security or child support income." *Id.* There was opposition to the concept in the House, and the provision was subsequently dropped in conference. H.R. Conf. Rep. No. 97-769, 97th Cong., 2d Sess. 446 (August 17, 1982).

In 1983, Secretary Heckler again proposed a sibling deeming provision for the AFDC program "to assure that limited Federal and State resources are spent as effectively as possible." Letter of 25 May 1983 to the Honorable George Bush, President of the Senate, App. 168-169. The proposal was contained in Section 102 of a draft bill entitled "Social Welfare Amendments of 1983." In an explanation to those provisions, Secretary Heckler stated:

> Section 102 of the draft would . . . (add) a new requirement that the State include, as a member of the AFDC family (both the needs and the countable income of) the parents and the minor siblings of the dependent child for whom aid is claimed and who are living with the dependent child if the siblings are, themselves, deprived of parental support or care and under the age limit selected by the State.

Section 102 was substantially identical to the present 42 U.S.C. Section 602(a)(38). It was approved by the Senate as part of S. 2062, the Omnibus Budget Reconciliation Act of 1983. S. Rep. No. 98-300, 98th Cong., 1st Sess. 165, Report of the Committee on the Budget, United States Senate, to Accompany S. 2062 (November 4, 1984). There was again opposition in the House to the proposal, and consideration was carried over to the following session.

See House Ways and Means Committee Report, Comm. Print No. 98-24, 98th Cong., 2d Sess. 29 (1984).

In 1984, the sibling deeming rule was added by the Senate as part of the Senate amendments to H.R. 4170, the Deficit Reduction Act of 1984. There had been no provision for sibling deeming at all in the House bill. When the bill went to the House-Senate Conference Committee, the following compromise was struck:

> The conference agreement follows the Senate amendment with the following modification: a monthly disregard of $50 of child support received by the family is established. The disregard is applied at eligibility determination and benefit calculation. The provision is effective October 1, 1984.

H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. and Ad. News 2095.

Neither the Senate nor the House bill had contained any disregard provision going into the conference. Nor had there been any disregard bills contemporaneous to the two prior sibling deeming bills which had passed the Senate but failed in the House. Secretary Heckler had never proposed a disregard provision in her prior legislative packages. Although the terse Conference Agreement does not state the purpose of the disregard, the context of its enactment and its placement in the same section of DEFRA as the sibling deeming provision strongly suggest that its purpose was to mitigate the harsh effects of the new mandatory filing rule. Because it was recognized that the new rule would primarily fall upon those siblings "receiving Social Security or child support income," S. Print No. 97-11, Senate Comm. on

Finance (February 1982), *supra*,[5] it is reasonable to infer that "child support" was intended to encompass Title II payments as well as support income from an absent wage-earning parent.

Nevertheless, the Secretary insists that the primary purpose behind the disregard's enactment was to provide an incentive to cooperate by the custodial parent in obtaining child support payments from the absent parent. Because any hint of an incentive purpose is wholly lacking in the disregard's legislative history, the Secretary looks

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[5] The Secretary argues that the language differentiating between "Social Security" and "child support" in some of the early legislative history materials shows that Congress had different things in mind when it used the two terms. Brief of Pet. at 21. It should be remembered, however, that Congress at that point was grappling with the issue of what income would be affected by sibling deeming and not even contemplating the question of the applicability of the disregard, which did not appear in any prior bill or legislative proposal until it was enacted pursuant to the 1984 conference compromise. There were special problems to be considered in deeming Title II child dependent payments as available to other family members in light of anti-alienation provisions prohibiting transfer or assignment. 42 U.S.C. Section 407. It would be natural, therefore, to differentiate between the two types of payments at that point.

Significantly, no Title II-child support distinction appears in the final Conference Report or in the enacted statutory language of the disregard, the two most authoritative sources of legislative intent. While legislative committee reports are strong evidence of congressional intent, they must be read in proper context and they do not preclude placing greater weight on more persuasive evidence of intent. *U.S.* v. *Ogilvie Hardware Co.*, 330 U.S. 709 (1947). Indeed, given the context of the differentiating references and what transpired later on, the language cited by the Secretary tends more to confirm congressional intent to apply the disregard to Title II than the other way around, hence the use of the word "any" in the final enactment.

to other legislation for such a purpose and then attempts to bootstrap the disregard. His analysis is patently erroneous and contrary to basic principles of statutory construction.

The 1974 legislation cited by the Secretary created, for the first time, the statutory obligation of AFDC applicants and recipients to assign support rights and cooperate with the agency in obtaining child support. 42 U.S.C. Section 602(a)(26)(D). Prior to this amendment, cooperation in establishing paternity and pursuing child support claims was not a condition of AFDC eligibility. Indeed, the 1974 statutory amendment actually resolved conflicting judicial rulings on this issue. *See, Lascaris* v. *Shirley*, 420 U.S. 730 (1975).

Along with the change, Congress adopted—as a temporary experiment—the limited pass-through of forty percent (40%) of the first $50 of support obtained. 42 U.S.C. Section 657(a)(1). According to the legislative history, this was done because:

> . . . The Committee feels it may be desirable to offer the mother a financial incentive to cooperate. *To demonstrate the possible effectiveness of the incentives*, the Committee bill *for the first year* of the program provides that forty percent of the first fifty dollars a month in support collection for a family would be disregarded. . .

S. Rep. No. 1356, 93rd Cong., 2d Sess. 23, *reprinted in* 1974 U.S. Code Cong. and Ad. News 8155 (emphasis added). The one-year time limit was actually incorporated in the statutory language. At the end of the year, the provision was not renewed.

The Secretary asserts that the absence of a definitive statement of purpose for the disregard in the 1984 legislative history makes resort to the 1974 enactment reasonable. Brief of Pet. at 20. But Congressional silence in 1984 in no way justifies looking back ten years to the purpose of unrelated legislation. "A determination under one statute should not be mechanically carried over into the interpretation of another statute involving significantly different considerations and legislative purposes." *Local 1976, United Brotherhood of C and J* v. *N.L.R.B.*, 357 U.S. 93, 110 (1958). *See also U.S.* v. *Price*, 361 U.S. 304 (1960).

The 1974 legislation was "significantly different" because that disregard was created for a one-year limited period to support the then brand-new cooperation requirement. However, by 1984, the cooperation requirement was a long-standing condition of eligibility which was well-known by recipients. A mother who failed to cooperate knew that she would lose her AFDC. There was therefore no reason in 1984 to provide a custodial AFDC parent with a financial incentive to cooperate.

But the Secretary suggests that the disregard also serves to provide the absent parent with an incentive and cites as an illustrative example the affidavit of David Jones filed in the district court below. Brief of Pet. at 26; J.A. 46. Upset that his independently supported child was to be forced into the AFDC assistance unit by sibling deeming, Mr. Jones states: "If my son is going to be forced to receive ADC and my money will be used to finance the ADC program, I see no reason to keep paying child support." *Id.*

This example better illustrates the absurdity of using the disregard as an incentive device. Mr. Jones had been paying up to $155 per month in child support, all of it going to his son directly. J.A. 45. With sibling deeming, those

payments would be diverted to the IV-D agency to reimburse the state for the AFDC funds paid to Paula Jones' assistance unit. Does the Secretary really think that Mr. Jones will be more likely to make his monthly payment if he knows that $50 of it will be sent to his son? It is far more logical to say that the extra $50 in 1984 was meant not to motivate absent parents, but to remove some of the sting of sibling deeming for the affected children.

The respondents certainly agree with the Secretary that nonpayment of child support by non-custodial parents is a grave national problem, Brief of Pet. at 26, but it does not follow that Congress was addressing that issue in the disregard legislation. It is highly unlikely that they were given the fact that forty-two days after passage of DEFRA, Congress enacted the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378 (1984), *reprinted in* 1984 U.S. Cong. and Ad. News 2095. These comprehensive amendments addressed a whole range of support enforcement issues, e.g. federal matching of administrative costs (Pub. L. No. 98-378, Section 4), special project grants to promote improvements in interstate enforcement (*Id.*, Section 8), state guidelines for child support enforcement awards (*Id.*, Section 18), and extension of Medicaid eligibility when support collection results in termination of AFDC eligibility (*Id.*, Section 20). It does not seem plausible that while Congress was in the midst of careful consideration of a comprehensive revision of the child support enforcement structure, it would randomly insert a cooperation provision in a bill that contained no other child support amendments. It also does not seem reasonable to assume, as does the Secretary, Brief of Pet. at 21-22, that Congress had the same purposes in mind when it enacted the disregard as it did when it later passed these amendments.

The Secretary maintains that his position is plausible and entitled to deference should this Court find that Congress had any other purpose in enacting the disregard other than mitigation of sibling deeming. Brief of Pet. at 24. Such as assertion is ridiculous. Certainly it is conceivable that there is some incentive element lurking in the disregard. What the Secretary fails to realize is that an incentive can operate within the context of Title II also. If an AFDC custodial parent knew that she would retain $50 of any Title II payments coming into the household through operation of the disregard, she would conceivably be motivated to apply for Title II for her children and, if necessary, initiate paternity proceedings to establish eligibility. Admittedly, the incentive would not be great, but it would be no less than that for the non-custodial, working parents whose payments are the only child support the Secretary wishes to disregard.

The Secretary seems to suggest that the disregard ought not to apply to Title II because such application would be contrary with the budget reduction goals of DEFRA. The Senate Finance Committee estimated that enactment of the sibling deeming rule would save $455,000,000 over a period of three fiscal years. *Bowen* v. *Gilliard*, 483 U.S. at 592. Taking at face value the Secretary's own estimates, the costs of applying the disregard of Title II child dependent payments would cost $43,800,000 annually or $131,400,00 over three years. There would still be a very substantial net savings as a result of the implementation of Section 2640 of DEFRA. Moreover, this Court has cautioned against the simplistic assumption that whatever furthers the broad purposes of a statute must be the law:

> (N)o legislation pursues its purposes at all costs. Deciding what competing values will or will not be

> sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent to assume that *whatever* furthers the statute's primary objective must be the law. (Emphasis supplied in text).

Rodrigues v. *U.S.*, 480 U.S. 522, 525-526 (1987). Because the Secretary's narrow reading of the statute is contrary to congressional intent is evidenced by the statutory language, structure and history, judicial deference to his interpretation is not warranted. *Chevron*, 467 U.S. at 844.

E. The Secretary's Failure To Apply The Disregard Statute In Accordance With Its Plain Language And Mitigating Purpose Leads Him To Irrational and Inconsistent Results.

When an agency acts erratically and inconsistently, its decisions should be accorded no deference. *Adamo Wrecking Co.* v. *U.S.*, 434 U.S. 275, 287 n.5 (1978). Although the Secretary claims to have developed and implemented a comprehensive and consistent interpretation of the disregard statute which limits its applicability to a narrow set of payments, he has not in fact done so. His refusal to follow the plain statutory language or to be guided by the purpose of Congress in enacting the statute, i.e. to mitigate the harm caused by sibling deeming, has led him to some startling results. For example, in response to inquiries from state IV-D agencies as to whether the $50 disregard applies to spousal support collected by a support enforcement agency, the Secretary replied:

> The $50 disregard payment applies to both child and spousal support. This conforms to Section 12 of Public Law 98-378 which requires state IV-D agencies to

> collect spousal support if a support obligation has been established with respect to the spouse and the IV-D agency is enforcing the child support order.

53 Fed. Reg. 21644 (June 9, 1988). This constitutes an incredibly broad reading of the disregard statute. The Secretary in his answer appears to be more concerned with *how* a payment is collected than with the *purpose* of the payment. Spousal support, of course, is not even designated as being for the child and benefits the child only indirectly. Yet, the Secretary would read the statute narrowly to deny application of the disregard to Title II child dependent payments, the sole purpose of which is to support children. This is a good example of how the Secretary reads the "including" parenthetical, discussed *supra*, to limit the disregard only to those payments collected by IV-D agencies.

The Secretary's treatment of voluntary payments would also seem to be inconsistent with a professed narrow reading of the statute. 45 C.F.R. Section 303.80(a). As discussed *supra*, there is no conceptual difference between a voluntary payment received by a household in the absence of any judicial or administrative order and a Title II child dependent payment, yet the disregard is applied to the former and not to the latter.

The following hypothetical situation illustrates the absurdity of the Secretary's position: a mother with three children applies for AFDC. She does not know the whereabouts of the father of two of her children and receives no support from him. The father of the third child is disabled and drawing Social Security disability benefits. His child is receiving Title II child dependent payments as a result. Under the Secretary's current policy, the Title II payments are counted as family income but no disregard is received by the assistance unit. However, if the non-

custodial father applies to become the representative payee for his child and forwards the child dependent payments directly to his child upon receipt, the Secretary would then recognize those funds as a voluntary payment and apply the disregard. Congress certainly did not intend to make such bizarre machinations necessary.[6]

[6] Respondents have also raised equal protection challenges to the Secretary's policy in the courts below and in their Response to the Petition for Writ of Certiorari. The Secretary's disparate treatment of two similarly situated classes of child support recipients, affording one the mitigating benefits of the disregard and not the other, does implicate the Fifth Amendment. However, because the Secretary's policy so clearly violates the statute and because an Equal Protection analysis would be so similar in this case to the Step II analysis of *Chevron*, respondents believe that the Court will not need to reach the constitutional question.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

45 U.S.C. Section 602

State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents

A State plan for aid and services to needy families with children must—

* * *

(38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title or in section 607(a) of this title (if such section is applicable to the State), if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter);

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No. 89-535

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELIZABETH STROOP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. This case concerns the meaning of the term "child support payments" in the AFDC disregard for "child support payments." 42 U.S.C. 602(a)(8)(A)(vi) (Supp. V 1987 & 102 Stat. 2346). In our opening brief, we showed that the term "child support" in the Social Security Act invariably refers to payments from absent parents and not to Social Security benefits (Gov't Br. 13-15); that the current version of the AFDC child support disregard explicitly refers to "payments * * * by the absent parent"

(*id.* at 15-16); that the problem of obtaining payments from absent parents has long been a central issue in the administration of the AFDC program (*id.* at 18-20); and that, to the extent there is ambiguity in the statutory language, the Secretary's interpretation is entitled to deference (*id.* at 22-29).

Respondents' principal contention is that the "plain meaning" of the term "any child support payments" in the AFDC child support disregard requires inclusion of Social Security child's insurance benefits within the disregard. Resp. Br. 11-16. As respondents put it, "Congress's intent in this instance can be determined unqualifiedly from the text of the statute itself." *Id.* at 11. Despite this "plain meaning" argument, however, respondents are unable to point to a single instance in which a federal statute refers to Social Security child's insurance benefits as "child support." In contrast, in our brief, we pointed to literally dozens of examples in other statutory provisions where the term "child support" is used to refer to payments from absent parents and not to refer to Social Security benefits of any kind. See Gov't Br. 13-15 & n.10, 17 n.16, 21.

Although respondents fail to point to any federal statutes supporting their "plain meaning" argument, they seek to minimize the significance of these many other statutory provisions. In response to twenty-two references to "child support" in the Social Security Act itself that clearly refer to parental payments and not Social Security benefits (Gov't Br. 13 n.10), respondents maintain that each reference "deal[s] with some aspect or other of the IV-D collection system." Resp. Br. 22.[1] This scarcely undermines the interpre-

[1] Title IV-D refers to the Child Support Enforcement section of the Social Security Act (42 U.S.C. 651 *et seq.*). Title IV-A refers to the AFDC section of the Social Security Act (42 U.S.C. 601 *et seq.*). An AFDC recipient must assign child support rights to the State (42 U.S.C. 602(a)(26)(A)) (1982 & Supp. V 1987), and the State is responsible for attempting to collect child support payments from the absent parent (42 U.S.C. 654 (1982 & Supp. V 1987)). (Title IV-D services are also available to non-AFDC recipients. 42 U.S.C. 654(6) (1982 & Supp. V 1987)).

tive significance of the fact that Congress employed a term—"child support"—with an established meaning in the context of those other Social Security Act provisions. See *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted).[2] What is more, respondents do not address the fact that the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, which contains the current version of the child support disregard (§ 102(a), 102 Stat. 2346), is replete with references to "child support" that clearly refer to payments from absent parents and not to Social Security benefits (Gov't Br. 17 n.16); nor do respondents address the fact that the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, which were passed contemporaneously with the child support disregard in 1984, is similarly replete

[2] Respondents' statement also is not entirely correct. The first five citations in our brief (at 13 n.10) are to provisions from Title IV-A of the Social Security Act (the AFDC section, where the child support disregard itself is found), and one of them does not concern IV-D at all. See 42 U.S.C. 602(a)(31)(D) (1982 & Supp. V 1987). The IV-A and IV-D programs, moreover, are closely related and contain numerous cross-references. See, *e.g.*, 42 U.S.C. 602(a)(27) (1982 & Supp. V 1987); 42 U.S.C. 654(4) (1982 & Supp. V 1987).

with references to "child support" that also refer to payments from absent parents and not to Social Security benefits (Gov't Br. 21). In addition, numerous other federal statutes likewise employ the term "child support" to refer to payments from absent parents and not to Social Security benefits.[3] Respondents essentially have no response to the enormous interpretative weight generated by the consistent use of the term in other federal statutory contexts.[4] The meaning that respondents would discern

[3] See, *e.g.*, 5 U.S.C. 8437(e)(3); 10 U.S.C. 1408(a)(2)(B)(i); 10 U.S.C. 1408(d)(1); 20 U.SC 1070a-6(15)(A); 20 U.S.C. 1087vv(b)(1); 20 U.S.C. 1087vv(c)(1); 26 U.S.C. 6103(*l*)(6) (1982 & Supp. V 1987); 26 U.S.C. 6103(*l*)(8) (1982 & Supp. V 1987); 29 U.S.C. 1056(d)(3)(B)(ii)(I); 43 U.S.C. 1606(h)(1)(C)(i) (Supp. V 1987).

Three of these provisions separately enumerate "child support" and "social security benefits" as distinct categories. See 20 U.S.C. 1070a-6(15)(A) and (L); 20 U.S.C. 1087vv(b)(1) and (12); 20 U.S.C. 1087vv(c)(1) and (12).

[4] In an apparent effort to shift the focus from the consistent use of the term "child support" in other statutory provisions, respondents repeatedly state that our interpretation rests on *Black's Law Dictionary* (Resp. Br. 19, 24, 26) and the "'essence of child support'" (*id.* at 9, 24, 26), even though our opening brief cites *Black's Law Dictionary* (5th ed. 1979) once (Gov't Br. 13 n.9) and never uses the term "essence of child support" at all. Proceeding from this mischaracterization, respondents criticize the use of a legal dictionary (Resp. Br. 19) and contend that "authorities of general reference" are more persuasive (*id.* at 20). Even if respondents' premises are accepted, the fact is that "child support" has the same meaning in non-legal dictionaries that it has in legal dictionaries. See *The Random House Dictionary of the English Language* 358 (2d ed. 1987) (unabridged) ("child support" defined as "money paid for the care of one's minor child, esp. payments to a divorced spouse or a guardian under a decree of divorce").

is not only not plain, it is contraindicated by these other statutory provisions.[5]

Respondents further maintain that their "plain meaning" argument is supported by the relationship between the term "any child support payments" and the phrase "(including support payments collected and paid to the family under section 657(b) of this title)." According to respondents, interpreting the term "child support payments" to mean payments from absent parents and not to include Social Security benefits is inconsistent with the "plain meaning" because such a reading embraces only the payments included by the parenthetical, and suggests no broader scope for the term "any child support payments." See, *e.g.*, Resp. Br. 17 (Secretary's interpretation "arbitrarily limits the disregard to IV-D pass-through payments"). As we pointed out in our opening brief (at 18), however, some payments from absent parents are received directly by AFDC households and are not "collected and paid to the family" through the IV-D agency. These direct payments from absent parents had been brought to Congress's attention by the Secretary as early as 1981.[6] Thus, the "plain meaning" of the relationship between the term "any child support payments" and the parenthetical, which "includ[es]" payments collected and

[5] In contrast to respondents' reliance on "plain meaning," the court of appeals concluded that "Congress has offered no answer to this question." Pet. App. 8a-9a.

[6] See 1 Office of Child Support Enforcement, U.S. Dep't of Health and Human Services, Sixth Annual Rep. to Congress 26 (1981) (describing the procedure for "the treatment of assigned child support payments received directly and retained by AFDC applicants or recipients").

received by the State, is entirely consistent with the conclusion that the term "child support payments" refers to payments from absent parents. See *Todd* v. *Norman*, 840 F.2d 608, 612-613 (8th Cir. 1988).[7]

Rejecting the significance of the meaning of "child support" in other federal statutory provisions, respondents maintain that the "plain meaning" of the term—and its supposed inclusion of Social Security child's insurance benefits—is settled by state law. Resp. Br. 20-21. However, the state law treatment is far less uniform—and indeed is far more complex—than respondents suggest. As the Eighth Circuit concluded, "review [of the state cases] indicates only that, under extenuating circumstances, some state courts find it equitable to treat Child's Insurance Benefits as a *substitute* for child support payments. * * * Others have reached a contrary result. * * * If Child's Insurance Benefits simply were 'child support payments,' the lengthy discourse on equity each of these courts engages in would be unnecessary." *Todd* v. *Norman*, 840 F.2d at 611.[8] Clearly the body of state law is inadequate to imbue "child support payments" with the "plain meaning" championed by respondents.

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[7] Respondents also rely on the use of the word "any." Resp. Br. 12-13. The word "any," however, cannot enlarge the category of the word (or words) it modifies, any more than "all," "each," or "every" could enlarge a category that it modified. The question before the Court remains the meaning of the term "child support payments," not the meaning of the word "any."

[8] Cf. *Rose* v. *Rose*, 481 U.S. 619, 622 (1987) (noting that state court did not allow Social Security child's insurance benefits to satisfy absent parent's child support obligation).

2. Respondents also minimize the significance of the fact that the current disregard provision, as amended in 1988, explicitly refers to payments from "the absent parent." Because the judgment under review is prospective, the amended disregard is directly relevant to this case. See Gov't Br. 15 n.13. The text of the current disregard (to be codified at 42 U.S.C. 602(a)(8)(A)(vi)) bears repeating:

> [I]n making the [AFDC eligibility and assistance] determination under paragraph (7), the State agency
>
> * * * *
>
> (vi) shall disregard the first $50 of any child support payments for such month received in that month, and the first $50 of child support payments for each prior month received in that month if such payments were made *by the absent parent* in the month when due, with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title). (emphasis added)

In response to this explicit reference to "payments * * * by the absent parent," respondents observe that the "absent parent" language was inserted for a different purpose. Resp. Br. 15. This is correct,[9]

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[9] As we explained in our opening brief (at 16 n.14), the 1988 amendment clarifies the disregard treatment for payments received in a different month from the month in which they were due. Thus, as respondents point out (at 15), the amendment clarifies that a lump sum payment which includes child support payments due in prior months is entitled only to a single $50 disregard; the amendment also clarifies that, when the absent parent makes a timely payment, that payment receives a disregard even if there is a delay in receipt of the payment.

but beside the point. Respondents cannot overcome the fact that the explicit language of the disregard now refers to "payments * * * by the absent parent," and contains no indication that the "child support payments" at issue are intended to encompass other payments, such as Social Security benefits.[10]

3. Respondents also maintain that the "plain meaning" of the child support disregard includes Social Security child's insurance benefits because of the character and history of those benefits. Resp. Br. 16-19. Respondents seek to rely on a quotation from the HHS Departmental Appeals Board decision that we lodged with the Court. *Id.* at 17. However, respondents quote the passage out of context and ignore the Board's explicit repudiation of the argument that child's insurance benefits should be included in the child support disregard.[11] Rather than

[10] Respondents' suggestion (at 15) that, under the amended version of the disregard, Social Security child's insurance benefits should be understood to receive the same treatment, for purposes of arrearages and timeliness (see n.9, *supra*), as payments from absent parents, does not comport with the plain language of the current disregard concerning prior payments by "the absent parent."

[11] See, *Georgia Department of Human Resources*, Doc. No. 88-40, Dec. No. 995 (Nov. 4, 1988) at 7 ("[I]t is inherently less reasonable to stretch the term 'child support payments' to cover all imaginable benefits to children, than it is to read the term to fit, as it easily does, into an existing specific structure."); *id.* at 8 (The "Social Security benefits in question are paid as a matter of statutory right regardless of any child support obligation and even in the absence of such an obligation. This is inconsistent with the common understanding of what child support is generally (and particularly in the Title IV-D program), and strongly suggests that Congress would have been more explicit had it intended" to include Social Security benefits in the disregard.); *ibid.* ("If the

supporting respondents' position, the Appeals Board decision emphatically rejects it.

Respondents also seek to rely on decisions of this Court and on the legislative history of the Social Security child's insurance benefits program to establish that the benefits are commonly understood as "child support." Resp. Br. 17-19. As we discussed in our opening brief (at 14-15), the fact that child's insurance benefits replace the support of a parent who is dead, disabled, or retired—as confirmed by the decisions of this Court and the legislative history of the child's insurance benefits program—does not mean that the benefits are ordinarily encompassed in the meaning of the term "child support," or that the terms "child's insurance benefits" and "child support" are interchangeable. As we have previously pointed out, no provision in the Social Security Act—neither the child's insurance benefit part of Title II nor the AFDC part of Title IV nor the Child Support Enforcement part of Title IV—suggests that child's insurance benefits are included in the term "child support."[12] In view of respondents' emphasis on the settled meaning of Social Security child's insurance benefits, it is surprising that respondents are unable

benefits in question are treated as child support, then problems arise concerning how the benefits would be treated under other provisions of the Social Security Act").

[12] Respondents cite *Rose* v. *Rose*, *supra*, and claim support from its holding that a state court may compel a veteran to use veterans' benefits to satisfy a state child support award. As with child's insurance benefits, however, particular state determinations that certain payments may be used to satisfy an absent parent's child support obligations are entirely different from a conclusion that such payments are automatically encompassed within Congress' use of the term "child support payments."

to point to a single statutory provision that includes Social Security child's insurance benefits as "child support." [13]

4. Respondents maintain that Social Security child's insurance benefits should be included in the child support disregard because of the legislative history of the disregard. According to respondents, the legislative history suggests that "its primary purpose was to lessen the impact of sibling deeming on the affected families" (Resp. Br. 30), and that "its purpose was to mitigate the harsh effects of the new mandatory filing rule." *Id.* at 32. We readily acknowledge that one aspect of the disregard—as of all AFDC disregards—is that it mitigates hardship, and the operation of this disregard clearly mitigates some hardship for affected families. Respondents proceed, however, as if the disregard, by its terms, provides an additional $50 per month for each family adversely affected by the family income requirement. The disregard does nothing of the kind. It applies to a very large group of AFDC families who were not affected at all by the family income requirement—those families who did not exclude siblings, but who, as a result of the disregard, received an

[13] As noted in our opening brief (at 15 n.12), moreover, the conventional distinction between "child support" and Social Security benefits can also be seen in respondents' complaint, which repeatedly referred to "child support payments or Social Security benefits," "child support or OASDI benefits," and similar phrases depicting "child support" and "Social Security benefits" as distinct items. See J.A. 19, 21, 31, 32, 34. As also noted in our opening brief (at 15), Section 2640 of the Deficit Reduction Act of 1984 (Pub. L. No. 98-369, 98 Stat. 1145-1146), which includes the disregard provision, itself refers to "child support payments" in the disregard provision (§ 2640(c)) and to "benefits provided under title II" in the family income requirement (§ 2640(a)).

additional $50 per month if an absent parent paid his child support. In contrast, the disregard does not apply to some families who *were* adversely affected by the family income requirement—those with previously excluded children who received income from a source other than "child support payments." Thus, respondents' insistence that the disregard must be interpreted as a device to mitigate the hardship of the family income requirement—and must be extended to Social Security child's insurance benefits—is at odds with the actual operation of the disregard. See Gov't Br. 26 n.29.[14]

At the same time, respondents completely reject the significance of the longstanding emphasis in the AFDC program on the problem of obtaining payments from absent parents, including the only prior instance of a child support disregard. See Resp. Br. 33-36. It surely is significant, however, that Congress chose a disregard patterned closely after the only prior child support disregard (even to the extent that they both used a benchmark of $50 per month)—and that the purpose of that prior disregard was explicitly to provide an incentive to encourage cooperation by custodial parents in obtaining payments from absent parents. See Gov't Br. 19-20, 25-26. Viewed in the context of the consistent emphasis in the AFDC

[14] Respondents quote from the Secretary's brief in *Bowen* v. *Gilliard* (Resp. Br. 29), but fail to acknowledge that the quoted comments were in the context of a case concerning only payments from absent parents and that the comments described the operation of the child support disregard in that context. Indeed, the Secretary explicitly drew a distinction between "child support" and "types of income other than child support * * * such as social security benefits." Reply Br. for the Federal Appellant, *Bowen* v. *Gilliard*, Nos. 86-509 and 86-564, at 8.

program on the central problem of obtaining payments from absent parents, including a prior experiment with a child support disregard, the passage of the child support disregard in 1984 can readily be seen as having as one purpose to encourage the payment of child support payments from absent parents. *Todd* v. *Norman*, 840 F.2d at 611-612.[15]

5. As we discussed in our opening brief (at 22-29), to the extent that the statutory language is ambiguous, the Secretary's interpretation is entitled to deference under settled principles of judicial review. See *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"); *Sullivan* v. *Everhart*, No. 88-1323 (Feb. 21, 1990), slip op. 5-6. Respondents, however, raise a series of scattered objections to the Secretary's interpretation, and maintain that deference is not appropriate. Respondents contend that the Secretary has never issued a definition of "child support payments" which would exclude Social Security child's insurance benefits. Resp. Br. 24-25. They ignore, however, the fact that the Secretary promptly issued an interpretation of the

[15] Respondents' statement that "[t]he Secretary * * * seems to be unable to accept that the legislative package was not enacted as proposed" (Br. 9), i.e., without the child support disregard, is mystifying. The child support disregard is now a substantial element of the AFDC program, costing the program (according to HHS records) close to $279 million in fiscal year 1989. The issue in this case is whether the disregard should be expanded to include certain Social Security benefits, but there is no question that, at the Secretary's direction, a disregard is now in effect for payments from absent parents.

child support disregard soon after it was enacted. See Gov't Br. 6-7, 23-24. The Secretary enumerated the payments that were entitled to be *included* in the disregard (parental payments of various kinds, including those collected and distributed by the State pursuant to 42 U.S.C. 657 (1982 & Supp. V 1987)). The Secretary had no obligation to enumerate all payments *not* entitled to the disregard, and the fact that he did not do so is hardly sufficient to deny the usual deference accorded the official charged with implementing a complex federal statute.

Respondents also claim that the difference in payment—Social Security benefits are paid every month by the federal government, whereas parental child support payments depend on the compliance and resources of an absent parent—is immaterial because Social Security benefits are derived from a parent's earnings. Resp. Br. 25. At the very least, however, respondents must concede that the difference in payments leads to a significant difference in the operation of the disregard for the two kinds of payments. Because the Social Security benefits are paid and guaranteed by the federal government, the disregard would operate automatically, and the Social Security benefits recipient would receive a $50 disregard each month; because parental child support payments are dependent on the compliance, resources, and ability of an absent parent, the payment from month to month is uncertain, and operation of the disregard is equally uncertain.[16]

[16] Respondents' contention (at 26) that the Family Support Act's requirement (§ 101(a), 102 Stat. 2344-2345) that IV-D collections be accomplished through mandatory wage assignments (to be codified at 42 U.S.C. 666(b)(3)) will make them indistinguishable from federally paid Social Security benefits is incorrect. Although it is to be hoped that

Respondents also contend that a child's "need" is no longer a factor in parental child support determinations (Br. 28); this statement is simply incorrect[17]

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the Family Support Act amendment will have the efficacy that respondents suppose, child support payments will nevertheless remain contingent from month to month on the absent parent's willingness and ability to obtain employment and his compliance with applicable requirements in his dealings with his employers; payment of Social Security child's insurance benefits, in contrast, has no such contingency. (Additionaly, not all employed absent parents receive payroll "wages" within the scope of 42 U.S.C. 666(b)(3); many are self-employed). As we pointed out in our opening brief, moreover, child support obligations generally terminate upon the parent's death (unless there is a special provision of state law or agreement between the parties to the contrary); Social Security child's insurance benefits, in contrast, are triggered by the insurd parent's death. See Gov't Br. 28; *Todd* v. *Norman*, 840 F.d at 610 n.2.

[17] Respondents' statement, which apparently relies on the requirement in 42 U.S.C. 667 that States establish child support guidelines, is wrong on several levels. First, the guielines themselves are supposed to reflect calculation of a child's needs. See, *e.g.*, S. Rep. No. 387, 98th Cong., 2d Sess. (198) 40 (guidelines are intended to ensure "reasonable consideation * * * to the needs of the child"); 50 Fed. Reg. 19,63 (1985) (guideline factors should include "the number ad needs of dependents"); 54 Fed. Reg. 37,868 (1989) (guielines should "provide for coverage of the child or childre's health care needs"). Second, as a result of the Family Support Act (Pub. L. No. 100-485, § 103, 102 Stat. 2346), the guielines now establish a "rebuttable presumption," which may e rebutted by a written finding that they are "unjust or inappropriate in a particular case" (to be codified at 42 U.S.C. 667(b)(2)); failure to meet a child's needs obviously is n important factor in considering whether the guidelines re "unjust or inappropriate in a particular case." Third, contrary to respondents' contention, the Virginia statute actuay reflects the continuing importance of a child's needs in chd

Finally, respondents object that the Secretary's determination to allow the disregard for voluntary payments and for spousal payments from absent parents is "irrational" and "startling." Br. 38. Both decisions, however, are consistent with the Secretary's determination that the disregard for "child support payments" applies to payments from absent parents. With respect to spousal support payments, they receive the disregard only if they are inseparable from child support payments—that is, if the absent parent's support obligations to the child and the spouse have been established, if the child and the spouse live in the same household, and if the child support is being collected along with the spousal support (see Gov't Br. 7 n.3); it was reasonable for the Secretary to conclude that, in such circumstances, spousal support payments from an absent parent should be treated like the child support payments with which they are joined.[18] With respect to voluntary child

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support awards. The guidelines themselves require the addition of any "extraordinary medical and dental expenses" incurred by the child (Va. Code § 20-108.2(D)), and "childcare costs incurred on behalf of the child" (Va. Code § 20-108.2(E)); furthermore, the state court is required to consider a number of factors, including the individual child's needs, in determining whether to apply the guidelines or reject them (Va. Code § 20-107.2(2); § 20-108.1).

[18] The administrative interpretation quoted by respondents (at 38-39) cites Section 12 of the Child Support Enforcement Amendments, which requires States to collect spousal support payments with child support payments when the conditions discussed above are met. That provision was clearly enacted to facilitate the collection of child support, and is consistent with congressional treatment of spousal support for child support purposes. See, *e.g.*, H.R. Rep. No. 527, 98th Cong., 1st Sess. 46 (1983) ("Present law permits States to enforce spousal support obligations in instances where the support order combines both child support and spousal support in the

support payments, moreover, the fact that payments are made voluntarily by an absent parent clearly does not alter the character of the payments.[19] The application of the disregard to absent parents' spousal support payments (when they are collected with child support payments), and to absent parents' voluntary support payments, thus is neither irrational nor startling, and is certainly an inadequate basis for overriding the deference due the reasonable interpretation of the official charged by Congress with administering the complex AFDC, Title II, and Child Support Enforcement programs.

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same order so that specific amounts for child support are not set forth. Without such a provision, States would be unable to enforce support for children in cases where orders provided for such support. The bill requires States to enforce spousal support in these instances, effective upon enactment."); H.R. Conf. Rep. No. 925, 98th Cong., 2d Sess. 50 (1984).

[19] Respondents' contention (Br. 39-40) that, if an absent parent is a representative payee of child's insurance benefits and the absent parent pays the money to the AFDC household, the provision of the Social Security benefits should be treated as a "voluntary payment" is incorrect. If an absent parent were the representative payee for Title II benefits, the provision of the funds for the child's use and benefit would be, not a voluntary support payment from an "absent parent" (49 Fed. Reg. 35,590 (1984)), but the mandatory discharge of a fiduciary responsibility for the expenditure of federal funds. 42 U.S.C. 405(j) (1982 & Supp. V 1987). Indeed, respondents' hypothetical underscores the difference between Social Security child's insurance benefits and "child support payments" in the context of the Social Security Act—if the child's insurance benefits in that context were considered voluntary "child support payments," they would be subject to the full range of statutory and regulatory requirements for such payments.

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Department of Justice

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